118 (1)

№. 08-968

In The
Supreme Court of the United States

JAMES E. HOUSTON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

*David M. Eldridge
Loretta G. Cravens
ELDRIDGE & BLAKNEY
400 W. Church Avenue
Suite 101 Cherokee Bldg.
Knoxville, TN 37902

865-544-2010

*Douglas A. Trant
ATTORNEY AT LAW
900 S. Gay Street
Suite 1502
Knoxville, TN 37902

865-525-7980

Counselors for Petitioner

**Counselors of Record*

January, 2009

LEGAL ADVANTAGE • 432 Walnut Street • Cincinnati, OH 45202
(800) 581-2252

QUESTIONS PRESENTED FOR REVIEW

1. What is the meaning of clear error in Rule 35(a) of the Federal Rules of Criminal Procedure?

2. What is the meaning of unwarranted disparity in sentencing under 18 U.S.C. § 3553 (a)(6)?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Sixth Circuit were:

James E. Houston, Appellant

United States of America, Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OPININONS BELOW

The Sixth Circuit in a published opinion on June 27, 2008 upheld Mr. Houston's sentence. On October 30, 2008 the Sixth Circuit denied Mr. Houston's petition for rehearing and rehearing *en banc* was denied.

JURISDICTION

The petition for rehearing was denied on October 30, 2008. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTES INVOLVED

18 U.S.C. § 3553(a)
Federal Rule of Criminal Procedure 35(a)

STATEMENT OF THE CASE

A two count information was filed on March 1, 2006 against James. E. Houston and seven codefendants. Count One charged a conspiracy to conduct an illegal gambling business involving a numbers lottery in violation of 18 U.S.C. § 371 and § 1955. (R. 1, Information).

Count Two charged conspiracy to launder the proceeds of an illegal gambling operation in violation of 18 U.S.C. § 1956(h) and § 1957. Id.

The information also contained forfeiture allegations seeking the forfeiture of 11 parcels of real property and more than $150,000 in U.S. Currency. Id.

All eight defendants entered guilty pleas to the information and with the exception of one defendant, who had violated the terms of her pretrial release, and Mr. Houston, all defendants received probationary sentences. On July 19, 2006 Mr. Houston's sentencing hearing was held and the district court announced a sentence of twelve months and one day incarceration followed by a term of three years supervised release. (R. 105, Minute Entry).

Prior to the entry of judgment, on July 24, 2006, Mr. Houston filed a motion for reconsideration of the sentencing decision. (R. 108, Motion).

On July 27, 2006, the district court issued a memorandum and order granting Mr. Houston's motion and imposing a sentence of two years probation. (R. 110, Memorandum and Order).

The judgment reflecting a sentence of two years probation was entered on July 31, 2006. (R. 112, Judgment).

On August 3, 2006 the United States filed a motion to strike the judgment entered on July 31, 2006. (R. 116, Motion).

On October 3, 2006 the district court entered a memorandum and order granting the government's motion to strike, vacated the judgment entered, and directed the entry of an amended judgment reimposing a sentence of twelve months and one day confinement. (R. 140, Memorandum and Order, attached as Appendix D).

The final amended judgment was entered on October 10, 2006. (R. 141, Amended Judgment).

Mr. Houston filed a timely notice of appeal to the Sixth Circuit Court of Appeals of the amended judgment on October 11, 2006. (R. 143, Notice of Appeal).

A three judge panel of The Sixth Circuit heard oral argument on November 27, 2007.

The Sixth Circuit issued a published opinion on June 27, 2008 denying Mr. Houston's appeal and affirming the sentence of twelve months and one day incarceration. Judge Clay authored the dissent.

Mr. Houston filed a petition for rehearing and rehearing *en banc* which the Sixth Circuit denied on October 30, 2008.

Mr. Houston has remained on bond pending appeal and filed a motion to stay the mandate pending petition for writ of certiorari which the Sixth Circuit granted on November 14, 2008.

STATEMENT OF FACTS

On April 19, 2006, Mr. Houston entered a plea of guilt to conspiracy to conduct an illegal gambling operation and to launder the proceeds of that operation as charged in the two count information. (R. 36, Minute Entry).

The plea agreement between Mr. Houston and the United States provided, among other things, that Mr. Houston had provided substantial assistance to the United States and that the United States would file a motion with the court setting forth the nature and extent of Mr. Houston's assistance. (R. 6, Plea Agreement). Pursuant to the plea agreement, Mr. Houston agreed to forfeit $208,000 in United States Currency, 11 real properties of substantial value, and an additional almost $150,000 dollars received as proceeds from

the sale of two additional properties. (R. 6, Plea Agreement).

A sentencing hearing was held on July 19, 2006. (R. 105, Minute Entry). At the hearing, after a presentation to the court by Mr. Houston's counsel, the government, pursuant to the plea agreement, advised the court that "any lawful sentence that this Court chooses to impose would be acceptable to us" and that "we really have no position for or against anything but a lawful sentence... ." (R. 107, Transcript of Sentencing Hearing at 10.)

Mr. Houston's written sentencing memorandum and the oral presentation made by counsel at the sentencing hearing, demonstrated that Mr. Houston had engaged in a lifetime of hard work and become a self-made entrepreneur establishing a substantial holding of legitimate businesses and real estate holdings.. (See R. 107, Transcript of Sentencing Hearing at 6-7; R. 96, Sentencing Memorandum.)

Mr. Houston is a man dedicated to supporting his two daughters, though no longer married to their mothers, dedicated to his family, and was the principal financial support and a

caretaker for his elderly mother. Id. (R. 107, Transcript of Sentencing Hearing at 7-8.)

The record before the district court also detailed Mr. Houston's extensive support of charitable, civic, and community causes, as well as, many private acts of kindness to individuals who credited Mr. Houston with keeping them from being homeless or destitute. Id. at 8-9.

At the age of 58, Mr. Houston stood before the court for sentencing on his first felony conviction to date, and accepted responsibility for his illegal conduct. Id. The court acknowledged that Mr. Houston had worked hard throughout his life, cooperated with the government, and agreed to a substantial forfeiture of real property and U.S. currency. (R. 107, Transcript of Sentencing Hearing at 14.) Upon the court's questioning, as had been determined in the presentence report, Mr. Houston acknowledged organizing the gambling offense. Id. at 16. Noting this fact "and these other factors and because of this downward departure," the court imposed sentence. Id. at 16-17. The court did not make any specific reference to Section 3553 or recite specifically that it had considered the factors in that statute.

At the conclusion of the sentencing hearing, the district court orally pronounced a sentence of twelve months and one day incarceration on each of the two counts of the information to run concurrently, followed by three years supervised release. (R. 105, Minute Entry). After announcing sentence, the district court acknowledged that it did not believe Mr. Houston would pose a risk of committing future offenses, and that he had been a good citizen. (R. 107, Transcript of Sentencing Hearing at 19-20.)

Prior to entry of the judgment, on July 24, 2006, Mr. Houston filed a motion for reconsideration of the court's sentencing decision on the grounds that the district court had not appropriately considered all factors required to be considered under Section 3553(a) and that it had not placed sufficient findings in the record regarding those factors. (R. 108, Motion; R. 109, Memorandum in Support). The motion illustrated for the district court that no defendant convicted of similar crimes under similar circumstances had ever been incarcerated in the Northern Division of the United States District Court for the Eastern District of Tennessee and thus, that the court had failed to consider the need to avoid unwarranted

sentencing disparities when it sentenced Mr. Houston. Id. Accordingly, the motion asserted that the court had committed clear error, and imposed a sentence greater than necessary to comply with the purposes of sentencing as set forth in 18 U.S.C. §3553(a)(2). Id.

Counsel for Mr. Houston discussed the motion for reconsideration with counsel for the United States prior to the filing of the motion. Id. Counsel for the United States informed defense counsel that it would defer to the court as to whether the court wished to reconsider the sentence announced, and this in turn was accurately represented to the district court. Id.

Three days later, the district court issued a memorandum and order granting Mr. Houston's motion and imposing a sentence of two years probation. (R. 110, Memorandum and Order). The district court agreed that it had not given proper consideration to a factor required to be considered when announcing its sentence of Mr. Houston. Id. The court stated it had not considered the disparity between the twelve month and one day sentence to incarceration imposed upon Mr. Houston and the fact that no other similar defendants in the Northern Division of the Eastern District of

Tennessee under similar circumstances had been sentenced to a term of incarceration. Id. The court further found that a sentence of incarceration for Mr. Houston was inconsistent and unjust. Id. The court, having found a sentence of incarceration too harsh and greater than necessary to comply with the purposes of sentencing outlined in 18 U.S.C. § 3553(a)(2), ordered a sentence of two years probation be imposed. Id. Judgment reflecting a sentence of two years probation was entered on the record on July 31, 2006. (R. 112, Judgment).

On August 3, 2006 the United States filed a Motion to Strike Amended Judgment arguing that the district court had no jurisdiction under Rule 35 and 18 U.S.C. §3582 to alter Mr. Houston's sentence, that the United States had not been given 10 days to respond to Mr. Houston's motion and that the factual basis for the change in sentence was flawed. (R. 116, Motion to Strike.) Further, the government asserted that Mr. Houston's counsel had not accurately informed the court of the position of the United States with regard to the defendant's motion to reconsider. "While the undersigned told defense counsel that he would defer to the Court as to whether the Court wanted to reconsider the sentence, in no way did

the undersigned indicate to defense counsel that the United States did not oppose a reduction in the sentence initially pronounced." Id. Later, the district court in addressing the United States assertions that defense counsel had misstated the government's position, did not find the government's accusations credible. (R. 140, Memorandum and Order at 7.) "Nevertheless, in light of the government's position, as will be more fully discussed below, the government's own description of its conversation with defense counsel is inconsistent with its present position. It is also very troublesome to the court." Id.

Mr. Houston filed a timely response to the government's motion on August 17, 2006 asserting: 1) that the doctrine of estoppel should apply to prevent the government from opposing the probationary sentence under the terms of the plea agreement entered into in the case and the previous representation to the district court it authorized be made; 2) the district court had jurisdiction to correct Mr. Houston's sentence under Rule 35 of the Federal Rules of Criminal Procedure; and 3) alternatively the district court had the inherent power to do so to prevent manifest injustice. (R. 133, Response to Motion.) On

October 3, 2006, the court concluded that it was compelled to grant the government's motion to strike, vacated the judgment entered, and ordered an amended judgment reflecting a sentence of twelve months and one day incarceration. (R. 140, Memorandum and Order). The amended judgment was entered on October 10, 2006. (R. 141, Amended Judgment).

The district court, even in granting the motion to strike, persisted unequivocally in its position that it had not considered all of the factors it was required to consider as set forth in 18 U.S.C. § 3553(a). Id. at 7. The court clearly stated that it had not considered unwarranted sentence disparities among defendants with similar records found guilty of similar conduct although consideration of this factor was required by 18 U.S.C. §3553(a). Id.

Mr. Houston filed his timely notice of appeal of the Amended Judgment on October 11, 2006. (R. 143, Notice of Appeal). Mr. Houston has remained released on bond pending appeal. (R. 161, Memorandum and Order).

A three judge panel of The Sixth Circuit Court of Appeals heard oral argument on November 27, 2007 and issued a published opinion

on June 27, 2008 denying Mr. Houston's appeal and affirming the sentence of twelve months and one day incarceration. Judge Clay authored the dissent.

Mr. Houston filed a petition for rehearing and rehearing *en banc* which the Sixth Circuit denied on October 30, 2008. Mr. Houston's subsequent motion to stay the mandate pending his petition for writ of certiorari was granted on November, 14, 2008.

REASONS FOR GRANTING THE PETITION

Question Presented for Review

1. What is the meaning of clear error in Rule 35(a) of the Federal Rules of Criminal Procedure?

A circuit split exists as to the meaning of "other clear error" in Rule 35(a) of the Federal Rules of Criminal Procedure. Rule 35(a) was adopted in 1944. The first sentence of the rule continued existing law. (Advisory Committee Notes, 1944 Adoption, Federal Rules of Criminal Procedure 35(a)).

The common law had allowed the Court to correct a clear error during that term of Court. According to Blackstone:

A judgment may be falsified, reversed, or voided, in the first place, *without a writ of error*, for matters foreign to or *debors* the record, that is, not apparent upon the face of it; so that they cannot be assigned for error in the superior court, which can only judge from what appears in the record itself: and therefore, if the whole record be not certified, or not truly certified, by the inferior court; the party injured thereby (in both civil and criminal cases) may allege a *diminution* of the record, and cause it to be rectified. Thus, if any judgment whatever be given by persons, who had no good commission to proceed against the person condemned, it is void; and may be falsified by shewing the special matter, without writ of error. As, where a commission issues to A and B, and twelve others, or any two of them, of which A or B shall be one, to take and try indictments; and any of the other twelve proceed without the interposition or presence of either A, or B: in this case all proceedings, trials, convictions, and judgments are void for want of a proper authority in the commissioners, and may be falsified upon bare

> inspection without the trouble of a writ of error; it being a high misdemeanor in the judges so proceeding, and little (if any thing) short of murder in them all, in case the person so attainted be executed and suffer death.

William Blackstone, Commentaries on the Laws of England, Book the 4th, Page 383-384, 1765.

The United States Supreme Court in Ex Parte Charles F. Sibbald v. United States, 37 U.S. 488, (1838) held:

> No principle is better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgments, for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes...

The Sixth Circuit affirmed that proposition in Rupinski v. United States, 4 F.2d 17 (6th Cir. 1925) when it held that records and decrees cannot be altered after term, except for clerical errors.

Rule 35(a) was amended in 1966 to provide that a court may correct a sentence proposed in an illegal manner within seven days. This

amendment was enacted to clear up some confusion caused by United States v. Mayer, 235 U.S. 55 (1914), which held that a judgment cannot be vacated after the term of court.[1]

The key question becomes, therefore, what constitutes "a clear error" under Rule 35(a). The confusion has increased since the decisions in United States v. Booker, 543 U.S. 220, 125 S. Ct. 738; 160 L. Ed. 2d 621(2005); Gall v. United States, 128 S. Ct. 586, 169 L.Ed. 2d 445 (2007) and Kimbrough v. United States, 128 S. Ct. 558, 169 L.Ed. 2d 481 (2007) causing a circuit split.

The First Circuit in United States v. Goldman, 41 F. 3d 785, 789 (1st Cir. 1994), held that a judge can correct a sentence under Rule 35(a) where the court has misunderstood the maximum term. That kind of misunderstanding constitutes clear error.

The Second Circuit in United States v. Waters, 84 F.3d 86, 90-91 (2nd Cir. 1996), held that the district court's failure to consider U.S.S.G. § 7B1.3 and the way it interacted with U.S.C. §

---

[1] See the excellent treatment by Judge Shackelford Miller Jr. on the history of Rule 35(a) and of 28 U.S.C. § 2255 and their interrelationship in Duggins v United States, 240 F.2d 479 (6th Cir. 1957).

3585(b) constituted clear error.[2] The Second Circuit also held that a sentence was clear error when the court directed it to run consecutively to a not yet imposed state sentence. United States v. Donoso, 521 F.3d 144 (2nd Cir. 2008).

The Fourth Circuit in United States v. Spring, 305 F.3d 276 (4th Cir. 2002) held that Rule 35(a) is applicable to a failure to afford the defense an opportunity to comment on a proposed departure. Such failure would constitute "clear error".

The Eighth Circuit in United States v. Ellis, 417 F.3d 631 (8th Cir. 2005) held that a challenge to the mandatory imposition of the calculated guideline sentence was preserved despite being first raised in a Rule 35(a) motion.

The Ninth Circuit in United States. v. Mejia-Pimental, 477 F.3d 1100 (9th Cir. 2007) held that the failure to properly understand the impact of a

---

[2] U.S.S.G. § 7B1.3(e) provides:
"Where the court revokes probation or supervised release and imposes a term of imprisonment, it shall increase the term of imprisonment determined under subsections (b), (c), and (d) above by the amount of time in official detention that will be credited toward service of the term of imprisonment under 18 U.S.C. § 3585(b), other than time in official detention resulting from the federal probation or supervised release violation warrant or proceeding."

safety-valve eligibility is clear error and can be corrected under Rule 35(a).

The Eleventh Circuit, however, in United States v. Lett, 483 F.3d 782 (11th Cir. 2007) held that corrections of clear error apply only to those demonstrated by binding precedent clearly on point or otherwise clearly beyond debate. That interpretation conflicts with the other circuits and clearly is not what was intended by the authors of Rule 35(a) or the common law.

The instant case involved a correction by the district judge within seven days of what the court believed to be a clear error. The Court had failed to consider the full panoply of factors mandated under 18 U.S.C. § 3553(a). The majority of the panel held that failure to consider the sentencing disparities was not clear error. United States v. Bostic, 371 F.3d 865 (6th Cir); United States v. Vonner, 516 F.3d 382 (6th Cir. 2008). The panel in the Bostic case held that clear error is an error that would "have resulted in remand by this court." The dissent in this case, however, opined that the majority upheld a procedurally infirm sentence. Failure to fully explain the extent of its consideration of the sentencing factors constituted clear error, in the opinion of Judge Clay.

The decision below and its predecessors leave open the question of whether "clear error" is to be interpreted as "plain error" or is "clear error" to be interpreted as a failure to consider and explain the factors under 18 U.S.C § 3553(a). There is now no question that the district courts have the discretion under United States v. Booker, 543 U.S. 220, 125 S. Ct. 738; 160 L. Ed. 2d 621(2005); Gall v. United States, 128 S. Ct. 586, 169 L.Ed. 2d 445 (2007) and Kimbrough v. United States, 128 S. Ct. 558, 169 L.Ed. 2d 481 (2007) to consider individual or regional disparity of sentencing in arriving at a fair sentence. United States v. Presley, 547 F.3d 625 (6th Cir. 2008). In Presley, the U.S. Sixth Circuit held that the district court could consider sentencing disparity between two codefendants. The court found the failure to do so would:

> Violate the spirit of the guidelines and be particularly inequitable for Davis to receive a 96 month sentence and Presley a 360 month sentence for the same conduct. Presley at 631.

If the court were to find that the spirit of the guidelines was violated between two codefendants similarly situated, the spirit of the guidelines would certainly be violated in failing to consider regional sentencing disparity when the court felt it was appropriate to do so. It was clear error for the court not to do so. The court corrected its error and the amended sentence should be allowed to stand.

This Court should decide the meaning of "clear error" in the sentencing realm since the decisions in Booker, Gall, and Kimbrough. The split of authority between the courts of appeal previously discussed shows that these courts have decided an important question of federal law which has not been but should be decided by this Court: how is "other clear error" under Rule 35(a) of the Federal Rules of Criminal Procedure to be determined? Rule 10(c), Rules of the Supreme Court of The United States.

2. What is the meaning of unwarranted disparity in sentencing under 18 U.S.C. § 3553(a)(6)?

A Circuit split exists with regard to the meaning of "unwarranted disparity" under 18 U.S.C. § 3553(a)(6). The circuits differ whether disparity must be viewed only in light of sentences nationally or whether disparity in sentencing at the codefendant, local, district, state, and circuit level is a necessary and proper consideration under 18 U.S.C. § 3553(a)(6). United States v. Wills, 476 F.3d 103 (2nd Cir. 2007); United States v. Cavera, __F.3d__, 2008 WL 5102341 (2nd Cir. 2008); United States v. Abu Ali, 528 F.3d 210 (4th Cir.2008); United States v. Smith, 510 F.3d 603 (6th Cir. 2007); United States v. Presley, 547 F.3d 625 (6th Cir. 2008); United States v. Houston, 529 F.3d 743 (6th Cir. 2008); United States v. McGee, 408 F.3d 966 (7th Cir. 2006); United States v. Boscarino, 437 F.3d 634 (7th. Cir. 2006); United States v. Saeteurn, 504 F.3d 1175 (9th Cir. 2007).

Further, the Sixth Circuit's definitions of unwarranted disparity is in conflict with this Court's previous decisions in Rita, Gall, and

Kimbrough. Rita v. United States, 127 S.Ct. 2456 (2007); Gall v. United States, 128 S.Ct. 586 (2007); Kimbrough v. United States, 128 S.Ct. 558 (2007).

18 U.S.C. § 3553(a) states that a sentencing court "shall consider" seven enumerated factors in determining a sentence that is sufficient but not greater than necessary. As relevant here, these enumerated factors include: the kind of sentence and range of sentence established by the sentencing guidelines, pertinent policy statements of the United States Sentencing Commission, and the need to avoid unwarranted sentence disparities among similarly situated defendants. 18 U.S.C. § 3553(a)(4)-(6).

The circuit courts have struggled to define unwarranted sentencing disparity under Section 3553(a)(6) and remain divided as to what extent disparity at the local, state, regional level interact and the extent to which they are properly included in the Section 3553(a)(6) analysis.

Although stating that Section 3553(a)(6) was primarily concerned with national disparity, the Second Circuit acknowledged that there exists a modest distinction between disparity as addressed by the guidelines and disparity under Section 3553(a)(6) in United States v. Wills, 476 F.3d 103,

110 (2nd Cir. 2007) (abrogated on other grounds by United States v. Cavera, __ F.3d __, 2008 WL 5102341 (2nd Cir. 2008)).

> It is not entirely clear what exactly it means for a district judge to consider the effects of an individual defendant's sentence on nationwide disparities. On the one hand, in order to avoid redundancy with § 3553(a)(4), it must require something different than mere consideration of the Guidelines, which are the statute's primary vehicle for reducing nationwide sentence disparities. On the other hand, it cannot be that a judge must act as social scientist and assess nationwide trends in sentencing with each new defendant – in effect, intuiting Guidelines revisions on an interim basis as a proxy for the sentencing commission.

Wills, at 110.

The Second Circuit, sitting *en banc*, addressed the application of local factors to sentencing in United States v. Cavera, __ F.3d __, 2008 WL 5102341 (2nd Cir. 2008). That court held that a district court could consider local factors in determining whether a departure was appropriate

to ensure that the sentence imposed was sufficient but not greater than necessary. Id. The majority stated that the Supreme Court had made clear that disparities in sentences imposed by different district judges are more likely to be warranted than differing appellate panels may recognize. Id. at *10. "[J]ust sentences often depend on insights drawn from the district court's 'day-to-day experience in criminal sentencing.'"[3] Id. at *20. (Katzmann, J., concurring) (quoting Koon v. United States, 518 U.S. 1, 98 (1996)). "District judges work with the benefit of insights and judgments-into persons, crimes, and the communities where crimes occur-that are not less valuable simply because they are sometimes unquantifiable." U.S. v. Jones , 531 F.3d 163, 170 -171 (2nd Cir. 2008).

The conclusion can be drawn from the Second Circuit's analysis in Cavera that not only are local factors an appropriate consideration, they are a necessary consideration for determining a sentence that is sufficient but not greater than necessary.

---

[3] The Sixth Circuit in this case gave no deference to the district court's "day-to-day experience in criminal sentencing." United States v. Cavera, __ F.3d __, 2008, WL 5102341 (2nd Cir. 2008).

The Fourth Circuit has questioned whether disparate sentences between codefendants are proper where the factor relied upon to distinguish the codefendants as not similarly situated was the fact that one had entered a plea of guilt and the other had gone to trial. United States v. Abu Ali, 528 F.3d 210 (4th Cir. 2008).

The Seventh circuit has also addressed a comparison of codefendants. In United States v. McGee, 408 F.3d 966, 988 (7th Cir. 2005), the Seventh Circuit directed the district court to consider whether there was an unwarranted disparity between the defendant's sentence and the sentence received by his codefendant. In McGee the court stated that although a sentencing court must be mindful of the goal of avoiding unwarranted sentencing disparity, it should do so only with a focus on the individual case and circumstances before the court. Id. The Seventh Circuit later held that Section 3553(a)(6) is concerned with disparity across judges and districts rather than defendants in a single case. United States v. Boscarino, 437 F.3d 634, 638 (7th Cir. 2006).

The Ninth Circuit has permitted the comparison of codefendants and their roles in the

relevant conspiracy for the purposes of evaluating unwarranted disparity. United States v. Saeteurn, 504 F.3d 1175 (9th Cir. 2007).

The Sixth Circuit, however, adheres to a definition of disparity under Section 3553(a)(6) as primarily concerned with disparity at the national level. The Sixth Circuit has held that Section 3553(a)(6) is intended to ensure that "there are no unwarranted disparities between the sentence of the defendant in question and the sentences of defendants in the aggregate." United States v. Smith, 510 F.3d 603, 610 (6th Cir. 2007); citing United States v. Wills, 476 F.3d 103, 109-110 (2nd Cir. 2007). As a result, in the Sixth Circuit, a sentencing judge is required only to consider disparity on a national level although this is same type of disparity the guidelines address. Simmons, 501 F.3d 620, 624 (2nd Cir. 2007). Defining unwarranted disparity only on the national level is not only redundant, it renders 18 U.S.C. § 3553(a)(6) superfluous.

The Sixth Circuit has also held a district court may, however, in its discretion consider unwarranted disparity between codefendants. United States v. Presley, 547 F.3d 625, 632 (6th Cir.

2008). The holdings in Simmons and Presley are inconsistent.

In the present case, the Sixth Circuit held that the district court "had necessarily taken into account the need to avoid unwarranted sentence disparities, viewed nationally." United States v. Houston, 529 F.3d 743, 754 (6th Cir. 2008). Further the Sixth Circuit again found that the definition of Section 3553(a)(6) unwarranted disparity is concerned only with national disparity and does not include local sentencing disparities.

Logic suggests that unwarranted disparity as considered under Section 3553(a)(4) by the guidelines and unwarranted disparity under Section 3553(a)(6) must include some distinguishing feature. Unwarranted disparity within a district court, across districts, within and across circuits, and nationally must all have a place in the determination of an appropriate sentence.

In some circuits, including the Sixth Circuit in this case, the definition of unwarranted disparity employed is also in conflict with prior decisions of this Court.

The United States Sentencing Guidelines take into consideration the need to avoid unwarranted disparity of sentences on a national

level. See Kimbrough v. United States, 128 S.Ct. 558, 574 (2007), 169 L.Ed.2d 481, (citing United States v. Pruitt, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)). The fact that the need to avoid unwarranted disparity is a consideration under the sentencing guidelines ***and*** Section 3553(a)(6) suggests that the disparity addressed by each must be distinct in some way.

During debate about the sentencing reform that led to the creation of the Sentencing Commission, Senator Kennedy argued that sentencing guidelines were necessary because "[f]ederal criminal sentencing is a national disgrace. Under current sentencing procedures, judges mete out an unjustifiably wide range of sentences to offenders convicted of similar crimes." United States. v. LaBonte, 70 F.3d 1396, 1419 (1st Cir. 1995) (citing 129 Cong.Rec. 1644 (1984). The motivation for creation of the Sentencing Commission was to address national disparity. "This is in keeping with Congress's objective, in adopting the Sentencing Reform Act of 1984, of eliminating disparity on a *national* level" United States. v. Tejeda, 146 F.3d 84, 87 (2nd 1998). Accordingly it is the guidelines that address

national uniformity and Section 3553(a)(6) disparity must encompass other considerations.

In Rita the Supreme Court found that when a district court imposes a within guidelines sentence it should reflect the fact that ***both*** the Sentencing Commission (through the guidelines) and the sentencing Judge have independently reached the same conclusion with regard to the appropriate sentence. Rita v. United States, 551 U.S. 338, 127 S.Ct. 2456, 2463, 168 L.Ed.2d. 203 (2007). The Court described the sentencing commission's evaluation as "wholesale" and the sentencing judge's evaluation as "at retail." Id. at 2463. This "retail" evaluation includes consideration of the factors listed in 18 U.S.C. § 3553(a), including both the sentencing guidelines and Section 3553(a)(6), and the need to avoid unwarranted sentencing disparities. A district court is not permitted to defer to the determinations of the Sentencing Commission without conducting an independent analysis of ***all*** the sentencing factors. Rita at 2465.

In Gall, the Supreme Court stated that a district court must begin its sentencing analysis by properly calculating the guidelines range and then ***independently*** considering the factors enumerated

in 18 U.S. C. § 3553(a). Gall v. United States, 128 S.Ct. 586, 596, 169 L.Ed.2d 445 (2007). A district court's failure to perform this analysis and state its reasoning for the sentence imposed results in a procedurally unreasonable sentence. Id. at 597. In Gall, the Supreme Court noted with approval the analysis performed by the sentencing court including the district court's comparison of codefendants when analyzing the need to avoid unwarranted disparity. Id. at 599-600.

In Kimbrough the Supreme Court stated that district courts must also consider the sentencing practices of other courts. Kimbrough v. United States, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007). Further, this Court recently clarified its holding in Kimbrough in Spears v. United States, __ S.Ct ___, 2009 WL 129044, Jan. 21, 2009 (per curiam.)

The Spears opinion made abundantly clear that the guidelines' recommendation cannot substitute for the judgment of the district court as to what is a sentence sufficient but not greater than necessary. See Spears at *2, *3. In Spears, this court made clear that the district court's discretion in sentencing under the advisory guidelines is broad. Spears at *2. Spears held that a district

court may categorically disagree with the crack cocaine guidelines and may substitute its judgment for what is a sufficient sentence to correct the disparity created by the guidelines even in a "mine run case". *4. See also U.S. v. Politano, 522 F.3d 69, 73 -74 (1st Cir. 2008) (holding that Post-Booker it is "apparent" that a district court has authority to consider factors in the community where the offense occurred.).

Accordingly, under Kimbrough, as clarified by Spears, a district court may correct a disparity it identifies without other justification for variance even in a mine run case. Certainly this discretion vested in the district court should authorize the district judge, as he did in the case at bar, to correct the disparity between Mr. Houston's sentence and the sentences previously imposed on other similarly situated defendant's in the same district and division.

These decisions support the conclusion that it is appropriate for a district court to consider matters other than disparity on a national level when addressing unwarranted disparity under 18 U.S.C. § 3553(a)(6). However, this Court's decisions have not made that clear and should. As a result, the circuit courts have attempted to define

unwarranted disparity. The resulting definitions of unwarranted disparity out of the circuits lack uniformity.

Contrary to Booker, Rita, Gall, and Kimbrough, the majority in this case "unrealistically suggests that the application of the Guidelines can substitute for independent consideration of the Section 3553(a) factors." United States v. Houston, 529 F.3d 743, 760 (2008) (Clay, J., dissenting).

By crafting numerous and inconsistent definitions of unwarranted disparity, the circuit courts have decided an important question of federal law which has not been but should be decided by this Court. Rule 10(c), Rules of the Supreme Court of the United States. In order to permit sentencing courts to independently consider the factors enumerated in 18 U.S.C. § 3553(a) and come to a reasoned judgment based on those factors it is necessary for this Court to define the meaning of unwarranted disparity under the statute and make clear to what extent local, district, regional, and national disparity interact under Section 3553(a)(6).

CONCLUSION

The appellant, James E. Houston, urges this Court to accept this Petition for a Writ of Certiorari to the Sixth Circuit.

Respectfully submitted this 26th day of January, 2009.

DAVID M. ELDRIDGE
(TN BPR #012408)
LORETTA G. CRAVENS
(TN BPR #023576)
ELDRIDGE & BLAKNEY P.C.
400 W. Church Ave., Suite 101
Knoxville, Tennessee 37902

DOUGLAS A. TRANT
(TN BPR #006871)
900 S. Gay Street
Suite 1502 Riverview Tower
Knoxville, Tennessee 37902

APPENDIX

SIXTH CIRCUIT COURT APPEALS FILINGS:

EASTERN DISTRICT OF TENNESSEE FILINGS:

OTHER:

No. 06-6329

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES E. HOUSTON,
Defendant-Appellant.

BEFORE: CLAY, SUTTON, and MCKEAGUE, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the

petition is denied. Judge Clay would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

RECOMMENDED FOR FULL-TEXT
PUBLICATION Pursuant to Sixth Circuit Rule 206
File Name: 08a0231p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 06-6329

v.

JAMES E. HOUSTON,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Tennessee at Knoxville.
No. 06-00027 - James H. Jarvis, District Judge.

Argued: November 27,2007

Decided and Filed: June 27, 2008

Before: CLAY, SUTTON, and McKEAGUE, Circuit Judges.

COUNSEL

ARGUED: David M. Eldridge, ELDRIDGE & BLAKNEY, Knoxville, Tennessee, for Appellant. John P. MacCoon, ASSISTANT UNITED STATES ATTORNEY, Chattanooga, Tennessee, for Appellee.

ON BRIEF: David M. Eldridge, Loretta G. Cravens, ELDRIDGE & BLAKNEY, Knoxville, Tennessee, for Appellant. John P. MacCoon, ASSISTANT UNITED STATES ATTORNEY, Chattanooga, Tennessee, for Appellee.

McKEAGUE, J., delivered the opinion of the court, in which SUTTON, J.,joined. CLAY, J. (pp. 12-16), delivered a separate dissenting opinion.

OPINION

McKEAGUE, Circuit Judge. Defendant-appellant appeals from ajudgment sentencing him to a prison term of twelve months and a day, followed by three years of supervised release. Appellant contends the district court erred by granting the government's motion to strike its amended judgment of sentence, under which he had been sentenced to probation only. In addition, appellant contends the reinstated original sentence is procedurally and substantively unreasonable. Finding that the district court did not err by striking the amended judgment and that the sentence ultimately imposed is not unreasonable, we affirm the judgment of the district court.

I. FACTUAL AND PROCEDURAL BACKGROUND

This appeal stems from an illegal gambling enterprise known as "the numbers." From 2000 to 2005, defendant James E. Houston, of Knoxville, Tennessee, and several co-conspirators ran an illegal gambling operation in the states of Alabama, Georgia and Tennessee that resembled a state lottery in many respects. Defendant, an otherwise legitimate and apparently successful businessman, served as the "bank" for the operation and derived substantial benefit from his participation.

In March 2006, a two-count bill of information was filed in the US. District Court for the Eastern District of Tennessee, alleging that defendant conspired to conduct an illegal gambling business involving a numbers lottery, in violation of 18 US.C. §§ 371 and 1955, and conspired to launder the proceeds of an illegal gambling operation, in violation of 18 US.C. §§ 1956(h) and 1957. Defendant pleaded guilty to both charges in April 2006. Pursuant to the plea agreement, defendant agreed to forfeit money and property obtained as a result of the gambling operation. The plea agreement includes the government's acknowledgment that defendant had

provided "substantial assistance" by encouraging his co-defendants to plead guilty, based upon which the government agreed to file a motion for downward departure pursuant to § 5K1.1 of the Sentencing Guidelines. The government further agreed to "represent to the Court that any lawful sentence that the Court deems appropriate is acceptable to the United States." Plea Agreement ¶ 7, JA 57.

Defendant was sentenced by the district court on July 19, 2006. According to the presentence report ("PSR") prepared by the Probation Department, defendant's base offense level under the Sentencing Guidelines was 12. The PSR recommended a four-level increase due to defendant's role as an organizer or leader of a scheme involving five or more participants, pursuant to § 3B1.1(a) of the Guidelines. Defendant's offense level was reduced by three levels due to his acceptance of responsibility. Defendant's single prior misdemeanor conviction in 1990 placed him in criminal history category I. The resulting Guidelines sentencing range was 15 to 21 months. Defendant did not object to the PSR.

During sentencing, the district court noted that defendant had worked hard to establish himself

as a businessman, had cooperated with the government, and had agreed to a substantial forfeiture of property. Accordingly, the court granted the government's motion for downward departure. The court declined defendant's request to impose a sentence of probation only, finding that defendant was the "organizer," "the main man," whom the other co-conspirators had trusted. Sentencing tr. pp. 16-17, JA 202-03. The court imposed a sentence of 12 months' imprisonment on each count, the two sentences to run concurrently. This sentence, the court observed, would afford "adequate deterrence" and 'Just punishment." *Id.* The court also imposed a supervised release term of three years. Upon request of defense counsel, the court changed the prison sentence to twelve months and a day so that defendant would be eligible for an earlier release from the Federal Bureau of Prisons. The court then asked if the parties had any objections to the sentence. Defendant did not object.

On July 24, 2006, five days after sentencing and prior to entry of the judgment, defendant filed a "motion for reconsideration." Defendant contended the sentence imposed, representing a downward departure of three months from the low end of the

advisory Guidelines range, was still greater than necessary to comply with the purposes of sentencing set forth at 18 US. C. § 3553(a)(2). He noted that the court had not expressly considered his arguments: (1) that he grew up in a community where playing the numbers was culturally accepted; and (2) that he had a history of assisting others in the community, had strong familial relationships, and provided support for his children and mother. Further, he complained that the sentence was disproportionately harsh in comparison with sentences imposed on other similarly situated defendants in the Northern Division of the Eastern District of Tennessee. In this respect, the motion was supported by the affidavit of defendant's attorney, David M. Eldridge, stating in pertinent part:

> Accordingly, based upon my personal experience as well as following cases in this court since 1988, to the best of my personal knowledge, no individual who has pled guilty to involvement in an illegal gambling business, cooperated, and received a Motion for Downward Departure has ever been sentenced to a term of incarceration in the Northern Division of the Eastern District of Tennessee. This category of defendants, who have not been incarcerated,

> includes those who have been denominated as an organizer or leader under the guidelines.

Eldridge aff. ¶ 5, JA 128. The motion represented that the government "does not oppose this motion for reconsideration if the Court deems it appropriate to reconsider Mr. Houston's sentence." Motion ¶ 11, JA 125.

Three days later, without conducting a hearing, the district court issued a memorandum and order granting defendant's motion. JA 148. The court confirmed that it *had* previously considered defendant's history and personal characteristics raised in the motion for reconsideration. The court acknowledged, however, that it had not previously considered the sentencing disparities issue. After considering the "new information" presented by defense counsel and "independently researching" the matter, the court concluded that defense counsel was correct and that a term of incarceration was too harsh and greater than necessary to comply with the purposes of sentencing. Memorandum and Order pp. 2-3, JA 149-50. The court ordered that the judgment of sentence be amended by substituting a period of two years' probation for the original prison term

oftwel ve months and a day. The judgment of sentence was entered on July 31, 2006.

On August 3, 2006, the government moved to strike the amended judgment for three reasons: (1) because the court lacked authority to amend defendant's sentence under Rule 35(a) of the Federal Rules of Criminal Procedure; (2) because defendant had misrepresented the government's position on the motion for reconsideration; and (3) because the factual basis for the sentence reduction was inaccurate. The district court granted the government's motion to strike the amended judgment on October 3, 2006. In a 10-page memorandum and order, the court explained that it had granted the motion for reconsideration and reduced defendant's sentence for two reasons. First, the court had been persuaded by defendant's new argument, as well as its own independent research, concerning the need to avoid unwarranted sentence disparities under 18 U.S.C. § 3553(a)(6). Memorandumand Order p. 3, JA 172. Second, despite being "acutely aware that it was on legal ground of questionable firmness when it granted defendant's motion for reconsideration," the court had relied on defendant's representation that

the government had no objection to the motion. *Id.* at 9, JA 178.

When the government belatedly raised its objection through the motion to strike, explaining that the earlier, inaccurate representation of its position had been the product of a miscommunication, the court was constrained to acknowledge that it was without authority to correct the original sentence under Rule 35(a). *Id.* at 8-9, JA 177-78. The court nevertheless maintained that it had not fully considered the sentence disparities factor when it originally sentenced defendant. *Id.* at 9, JA 178. Further, the court acknowledged that the government's opposition to the reduced sentence demonstrated that the record remained incomplete and inadequate to enable fair comparison of similarly situated defendants. Hence, the record remained insufficiently developed to permit a determination whether defendant's twelve-months-and-a-day prison term constituted an unwarranted disparity under § 3553(a)(6). Yet, being without authority to alter the originally imposed sentence, the court was "compelled to reimpose the sentence originally announced on July 19, 2006." *Id.* at 10, JA 179. The amended

judgment was entered on October 10, 2006 and this appeal followed.

II. ANALYSIS

A. Order Striking Amended Judgment

The district court concluded that it did not have authority to correct the originally pronounced sentence and therefore granted the motion to strike. Defendant contends that the district court erred when it granted the government's motion to strike the amendedjudgment, insisting that the district court *did* have authority to correct "clear error" in the original sentencing. The asserted "clear error" the district court was asked to correct was twofold. *See* Memorandum in Support of Reconsideration pp. 4-6, JA 132-34. First, defendant contended the district court had not adequately explained why its consideration of two factors under 18 US.C. § 3553(a)(1) did not warrant a downward variance greater than three months. Specifically, these two asserted factors are "the nature and circumstances of the offense" (i.e., the fact that defendant grew up in a community where playing the numbers was culturally accepted); and "the history and characteristics of the defendant" (i.e., his strong

familial relationships and his history of generosity to others and good citizenship). *Id.* Second, the district court was said not to have expressly considered, under 18 US.C. § 3553(a)(6), "the need to avoid unwarranted sentence disparities." Arguing that these failures by the district court represented "clear errors" that were correctable by the district court, defendant now would have us vacate the order striking the amended sentence and remand the case to the district court for entry of the original amended sentence of two years' probation.

Whether the district court had the authority to resentence defendant is a question of law subject to *de novo* review. *United States v. Ross*, 245 F.3d 577,585 (6th 9r. 2001). The authority of a district court to resentence a defendant is limited by statute. *Id.* at 585.[1] Specifically, 18 US.C. § 3582(c)(1)(B) provides in relevant part that a "court may not modify a term of imprisonment once it has been imposed except that ... the court may modify an imposed sentence of imprisonment to the extent

---

[1]The Ross court rejected the argument that a sentencing court has any inherent power to modify a sentence of imprisonment. 245 F.3d at 586.

otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure. "

Rule 35(a) represents the only arguably applicable authority for correction of the original sentence in this case. It provides that, "[w]ithin 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." The authority to correct a sentence conferred by Rule 35(a) is "extremely limited." *United States v. Arroyo*, 434 F.3d 835,838 (6th Cir. 2006). As the Rule 35 Advisory Committee Note makes clear, the rule "is not intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines or ... simply to change its mind about the appropriateness of the sentence ... [or] to reopen issues previously resolved at the sentencing hearing through the exercise of the court's discretion with regard to the application of the sentencing guidelines." *See also United States v. Galvan-Perez*, 291 F.3d 401,406-07 (6th Cir. 2002) (noting that a sentencing judge may not use Rule 35(a) to alter a discretionary decision merely because he later had a "change of heart"). Unless an error is an "obvious error or mistake" that would have resulted in a

remand by the appellate court, it is outside of Rule 35(a)'s narrow purview. *Arroyo*, 434 F.3d at 838.

The original sentence imposed by the district court in this case was not marked by any arithmetical or technical error. Hence, the district court had authority to modify its original sentence only if it suffered from some other "clear error" that would have necessitated an appellate remand for re-sentencing. In granting defendant's motion for reconsideration, the district court did not identify such an error. Rather, it relied on the government's purported non-objection to reconsideration and the "new information" produced by defense counsel and confirmed by the court's own independent research concerning sentences imposed on other "similarly situated" defendants in the Northern Division of the Eastern District of Tennessee. In other words, based on new information, the district court reconsidered, or changed its mind concerning, the extent of the appropriate downward adjustment from the low end of the advisory Guidelines sentencing range.

When the government belatedly lodged its objection, the district court characterized its amended sentence as having been premised on a "perceived

misinterpretation of sentencing factors," an error the district court conceded was beyond its power to correct, citing *United States v. Durham*, 178 F.3d 796, 800 (6th Cir. 1999). Memorandum and Order p. 8, JA 177. Thus, although the district court regretted not having fully considered the sentence disparities issue when it first sentenced defendant, it concluded that its failure to do so did not constitute the sort of "clear error" that it was at liberty to correct. In this, defendant contends, the district court erred. For the reasons that follow, we disagree.

The gravamen of defendant's argument is that the district court's failure to explicitly consider the required § 3553(a) factors constitutes "clear error" within the meaning of Rule 35(a), i.e., an error that obviously "would have resulted in remand by this Court." *Arroyo*, 454 F.3d at 838 (quoting *Galvan-Perez*, 291 F.3d at 407). In support of this argument, defendant has relied in part on *United States v. Vonner*, 452 F.3d 560 (6th Cir. 2006) (vacating a sentence for failure to provide adequate explanation). *See* Memorandum in Support of Reconsideration pp. 4-6, JA 132-34. The *Vonner* decision has been vacated, however, by the Sixth Circuit sitting *en banc*, which recently issued a new

ruling, applying plain-error review and affirming the district court judgment. *United States v. Vonner*, 516 F.3d 382 (6th Cir. 2008). The *en banc* court's *Vonner* decision is important to our resolution of the instant appeal for a couple of reasons.

As a threshold matter, *Vonner* applied plain-error review, per *United States v. Bostic*, 371 F.3d 865 (6th Cir. 2004), because defendant Vonner had not, when given the opportunity at sentencing, expressly stated an objection to the adequacy of the court's explanation for the sentence. *Vonner*, 516 F.3d at 385-86. This teaching is relevant here, too, as we consider whether the district court's asserted errors were of such a nature that they should have been viewed, in the eyes of the district judge, as obviously warranting an appellate remand. *Vonner* confirms the already wellestablished *Bostic* rule: If, at the conclusion of a sentencing hearing, the judge asks the parties whether they have any objections to the proposed sentence that have not previously been raised, and the relevant party does not object, then plain-error review applies on appeal to those arguments not preserved in the district court. *Id.* at 385. Here, when the district court asked the parties whether there was any objection to the proposed

sentence, no objection was made. That is, defendant did not challenge the adequacy of the court's explanation of its sentence and did not raise the sentence disparities issue. It follows that appellate scrutiny would have been limited to plain-error review. And because, as we demonstrate below, defendant has not shown plain error, we agree with the district court that he did not show clear error either.

Under plain-error review, relief is granted only under "exceptional circumstances." *Id.* at 386. That is, defendant Houston would have been required to show "(1) error (2) that was 'obvious or clear,' (3) that 'affected defendant's substantial rights' and (4) that 'affected the fairness, integrity, or public reputation of the judicial proceedings.'" *Id.* (quoting *United States v. Gardiner*, 463 F.3d 445, 459 (6th Cir. 2006)).

In *Vonner*, the *en banc* court applied plain-error review to the question whether re-sentencing was required where the district court had imposed a within-Guidelines sentence without explicitly stating why it denied the defendant's request for a downward variance. The court acknowledged that the sentencing court's explanation

was not "ideal;" that it failed to specifically address all of Vonner's arguments for leniency. Yet, the record demonstrated that the district court had considered the nature and circumstances of the offense and the history and characteristics of the defendant. Nothing in the record suggested that the sentencing court did not listen to, consider and understand every argument Vonner made. Citing *Rita v. United States*, - U.S. - , 127 S.Ct. 2456, 2469 (2007), the court observed that a lengthy reasoned explanation was not required because the request for leniency was "conceptually straightforward." *Vonner*, 516 F.3d at 388. Further, the court noted that Vonner's arguments in mitigation were not disputed by the government and therefore did not amount to "controverted matters" on which the district court was required to rule under Rule 32 of the Federal Rules of Criminal Procedure, Fed. R. Crim. P. 32(i)(3)(B). *Id.* at 388-89. Hence, the *en banc* court concluded the sentencing court had not *plainly* violated its duty to analyze the *relevant* sentencing factors or Vonner's arguments for leniency. *Id.* Vonner's inadequate-explanation objection was overruled, his procedural-unreasonableness challenge was denied, and the district court's judgment of sentence was affirmed.

Here, defendant Houston's request for reconsideration was based on two asserted errors. First, he argued that the district court did not adequately explain why such circumstances as cultural acceptance of gambling, familial relationships, and his history of generosity were not deemed to merit a greater-than-three-months downward variance. *Id.* In response, the district court confirmed that it had fully considered these circumstances. Memorandum and Order p. 2, JA 149; Memorandum and Order p. 2, JA 171. Clearly, the district court's mere failure to fully *explain* the extent of its consideration of sentencing factors, which it had in fact fully considered, could not have been viewed by the district court as plain error so affecting Houston's substantial rights and impugning the fairness of the proceeding that appellate correction would have been clearly warranted. This conclusion is further buttressed, of course, by *Vonner*'s holding on the merits of a similar adequacy-of-explanation challenge. The district court did not err, therefore, in its determination that this first basis for reconsideration did not constitute "clear error" that it had authority to correct under Rule 35(a).

The second basis for defendant's motion for reconsideration was the district court's failure to expressly consider the need to avoid unwarranted sentence disparities. The district court freely acknowledged that it had not fully considered this factor. Based on defense counsel's affidavit, attesting to his knowledge and belief concerning sentences received by other gambling offenders in the area, the district court undertook confirmatory research and, in view of the government's supposed non-objection, amended the original sentence. "In light of this new information," the court explained, "[and] [g]iving due weight to the [sentencing] factors, the court is now of the opinion that a sentence of twelve months and one day is greater than necessary ..." Memorandum and Order p. 3, JA 150. In other words, the district judge changed his mind in his application of the Sentencing Guidelines, thereby acting outside the bounds of his authority under Rule 35(a), as he later freely conceded.

Further, this sentence disparities factor was not mentioned in the PSR (to which defendant did not object), and neither party made an issue of the factor prior to or during the sentencing hearing. Because defendant did not preserve the issue per

Bostic, an appellate challenge to the sentence on this basis would also have been subject to plain error review. It is also apparent that, since the sentence disparities factor had not been raised, it had not become a manifestly "relevant" sentencing factor at the time of sentencing and, per *Vonner*, the court's failure to consider it could hardly have been viewed as "clear" or "plain" error, if error at all. *See also United States v. Kirchhoj*, 505 F.3d 409, 413 (6th Cir. 2007) ("If the record demonstrates that the sentencing court addressed the *relevant* factors in reaching its conclusion, the court need not explicitly consider each of the § 3553(a) factors or engage in a rote listing or some other ritualistic incantation of the factors." (citing *United States v. Dexta*, 470 F.3d 612, 614-15 (6th Cir. 2006)(emphasis added)); *United States v. Simmons*, 501 F.3d 620, 625 (6th Cir. 2007) (holding that district judge is required to explicitly consider only those factors raised by defendant or otherwise particularly relevant).

In *Simmons*, moreover, the court specifically addressed the § 3553(a)(6) sentence disparities issue and held that the sentencing court was under a duty to explicitly consider it only if raised by the defendant or ifit was otherwise shown to be "particularly

relevant." *Simmons*, 501 F.3d at 625. *See also United States v. Husein*, 478 F.3d 318, 330-32 (6th Cir. 2007) (upholding sentence over procedural- unreasonableness challenge where five of six sentencing factors were considered, even though § 3553(a)(6) was left undiscussed). Otherwise, a failure to explicitly consider the § 3553(a)(6) factor could be deemed to evidence a procedurally unreasonable sentence only if the failure were shown to stem from a "complete ignorance of that factor." *Simmons*, 501 F.3d at 626.

Here, the sentence disparities issue had not been raised by defendant at the time of sentencing and there was no reason to believe it was particularly relevant. When, post-sentencing, the sentencingjudge was confronted with "new information" concerning sentencing practices in the vicinity, he *believed* that he had ignored this factor. In this belief, however, the sentencing judge misconceived the nature of the factor. "Subsection 3553(a)(6) is concerned with *national* disparities among the many defendants with similar criminal backgrounds convicted of similar criminal conduct." *Id.* at 623 (emphasis added). This factor is designed to "ensure nationally uniform sentences among like offenders." *Id.* Considering that one of the fundamental purposes of the Guidelines is

to help maintain national uniformity in sentences, and considering that most sentences are within the Guidelines, the Guidelines themselves represent the best indication of national sentencing practices. *Id.* at 626.

Hence, by initially and correctly determining what defendant Houston's advisory Guidelines range would be, the sentencing court necessarily-albeit implicitly and even unwittingly-took account of the national uniformity concern embodied in § 3553(a)(6). *See id.* Contrary to his own belief, the sentencing judge did not fail to consider the sentence disparities factor. The Supreme Court recently elaborated on this very point:

> As with the seriousness of the offense conduct, avoidance of unwarranted disparities was clearly considered by the Sentencing Commission when setting the Guidelines ranges. Since the District Judge correctly calculated and carefully reviewed the Guidelines range, he necessarily gave significant weight and consideration to the need to avoid unwarranted disparities.

Gall v. United States, - U.S. -, 128 S.Ct. 586, 599 (2007). *See also United States v. Phinazee*, 515 F.3d 511, 520 (6th Cir. 2008) (observing that Guidelines as a whole embrace the need to avoid unwarranted sentence disparities). The district court did not, therefore, clearly err by failing to expressly describe its consideration of the unasserted sentence disparities issue.

Moreover, the representations made by defense counsel in support of reconsideration, i.e., the representations that triggered the sentencing judge's misapprehension that he had committed error, did not even implicate national sentence disparities. They pertained to *local* sentence disparities, which are not a concern of § 3553(a)(6). The district judge, in his discretion, might have considered local disparities to be a relevant consideration if timely raised. We cannot hold, however, that he clearly erred by failing to take such a non-mandatory consideration into account where it had not been timely raised.

We therefore conclude that neither of the asserted grounds for reconsideration presented the sort of clear error that would have warranted

appellate remand. The district court lacked authority under Rule 35(a) to alter the sentence originally imposed. Of course, this is the very conclusion that the district court correctly reached when it granted the government's motion to strike the amended sentence.[2] Inasmuch as this is the only basis on which defendant Houston challenges the district court's order granting the government's motion to strike, we overrule the objection and uphold the order vacating the amended judgment.[3]

---

[2] This conclusion is further buttressed, as the district court ultimately recognized, by the fact that, in the sentencing context, "there is simply no such thing as a 'motion to reconsider' an otherwise final sentence." *United States v. Dotz*, 455 F.3d 644, 648 (6th Cir. 2006). Rather, as discussed above, the sentencing court's authority to alter a sentence of imprisonment after it has been imposed is narrowly circumscribed, per 18 U.S.C. § 3582(c)(1)(B).

[3] In his reply brief, defendant argues that the government should have been deemed barred from moving to strike the amended sentence in the first place. In ¶ 7 of the plea agreement, defendant correctly asserts, the prosecution had agreed to accept "any lawful sentence that the Court deemed appropriate." JA 57. The motion to strike did not contravene this promise, however. As the foregoing analysis demonstrates, the amended sentence was

As a consequence of that order, the district court proceeded to re-impose the original sentence, sentencing defendant to a prison term of twelve months and a day. Defendant challenges this sentence as procedurally and substantively unreasonable.

B. Procedural Unreasonableness

Even though the sentence ultimately imposed represents a three-month downward variance from the low-end of the advisory Guidelines range, defendant contends the sentence is marked by procedural unreasonableness because the sentencing judge admitted that he failed to fully consider the § 3553(a)(6) sentence disparities issue. Had this factor been properly considered, defendant argues, it is evident that the sentencing judge would have granted a greater downward variance. That is, notwithstanding our holding that the district court did not "*clearly* err," defendant maintains that the

---

beyond the court's authority to issue and was, to this extent, not a "lawful sentence." *See United States v. Moncivais*, 492 F.3d 652, 662 (6th Cir. 2007) ("Plea agreements are to be enforced according to their terms.").

court "erred" by imposing a procedurally unreasonable sentence.

We review ajudgment of sentence for reasonableness under an abuse-of-discretion standard. *Gall*, 128 S.Ct. at 594. To obtain relief, an appellant must show that the sentence is either procedurally or substantively unreasonable. *Id.* at 597; *United States v. Vowell*, 516 F.3d 503, 509-10 (6th Cir. 2008). A sentence may be held procedurally unreasonable if it is marked by "significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence-including an explanation for any deviation from the Guidelines range." *Gall*, 128 S.Ct. at 597. Hence, a sentencing court's failure to consider a § 3553(a) factor may render a sentence procedurally unreasonable.

As the above analysis makes clear, defendant Houston's sentencing was not procedurally infirm. Again, because defendant did not timely object to the court's failure to explicitly consider the matter of

sentence disparities, and raised the issue only after sentencing, at a time when the district court was without authority to alter the sentence already imposed, we review only for plain error. *Vonner*, 516 F.3d at 386, 392 ("While we do not require defendants to challenge the "reasonableness" of their sentences in front of the district court, we surely should apply plain-error review to any arguments for leniency that the defendant does not present to the trial court.").

The first step in plain-error review is to determine whether the lower court erred. Did the district court commit procedural error? The district judge believed, post-sentencing, that he had failed to consider § 3553(a)(6) and that this failure constituted error, albeit not "clear error." In the foregoing analysis, however, we have explained that it was the district judge's belief, rather than the sentence imposed, that was erroneous. By correctly calculating defendant Houston's Guidelines range, the district judge had necessarily taken into account the need to avoid unwarranted sentence disparities, viewed nationally. The matter of supposed *local* sentence disparities, brought to his attention post-sentencing, which he believed could be relevant, is not a matter

within the contemplation of § 3553(a)(6). Notwithstanding the district judge's post-sentencing misunderstanding about the nature of this sentencing factor, the sentence ultimately imposed is not procedurally infirm because he failed to consider an unasserted, non-mandatory factor.[4] Contrary to defendant's argument, the record demonstrates that the district court did adequately consider the national sentencing disparities concern embodied in § 3553(a)(6). We therefore reject defendant's procedural- unreasonableness challenge.[5][6]

---

[4] To be sure, defendant was free to argue for leniency, prior to or at the sentencing hearing, based on local trends in sentencing of gambling offenders. If he had so argued, it would have been within the district court's discretion to accept the argument as warranting an even greater downward variance. We hold simply that the sentence imposed is not procedurally unreasonable merely because the court did not consider a potentially relevant, but unasserted, nonmandatory sentencing factor.

[5] This case is distinguishable from *United States v. Christman*, 509 F.3d 299 (6th Cir. 2007), where a sentence which the district court acknowledged was marked by procedural error, but which the district court was powerless to correct under Rule 35(a), was vacated and the matter remanded for re-sentencing. In *Christman*, the sentencing judge *had* committed a

legal error which impacted the length of sentence; here, the district judge erroneously *believed* he had committed legal error, when in fact he had not.

[6] In his separate opinion, our dissenting colleague strains to characterize the district court as confused and our affirmance as "astounding" and "inexplicable." The characterizations are inapt.

Twice, the dissent describes the district court as having gotten "turned around." In actuality, the "turned around" reference in the sentencing transcript, JA 188, does not evidence confusion in the sentencing proceeding at all. Rather, it is derived from a quip made by the district judge before the sentencing even began as he entered the courtroom and reacted, ostensibly, to the defendant and his counsel having seated themselves at the table ordinarily occupied by the Assistant U.S. Attorney. It was a trivial irregularity that played no role in the sentencing proceeding.

No less inaccurate is the dissent's description of our procedural- unreasonableness analysis as astounding and inexplicable. As explained in quite some detail, our affirmance is the product of rather ordinary application of plain-error review. Our dissenting colleague would prefer not to be constrained by plain-error review. Yet, as justification for avoiding the clear, well-established and binding teaching of Sixth Circuit rulings like *Vonner* and *Bostic*, the dissent cites no authority but an Eighth Circuit opinion, *United States v. Ellis*, 417

C. Substantive Unreasonableness

Defendant also argues that his sentence is substantively unreasonable, i.e., greater than necessary to comply with the purposes of sentencing. Defendant need not have asserted a substantive-unreasonableness objection in the district court to preserve the issue for appeal. *Vonner*, 516 F.3d at 389 (observing that, because "reasonableness" is the standard of appellate review, a litigant has no duty to object in the district court to the unreasonableness of the length of the sentence). Hence, we review the substantive-unreasonableness challenge not for plain error, but for abuse of discretion. The Supreme Court has defined the scope of this review as follows:

> When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. If the sentence is within the Guidelines range, the

---

F.3d 931,933 (8th Cir. 2005). *Ellis* carries no weight in this context, however, because the Eighth Circuit, in its application of Rule 35(a), was unconstrained by a *Bostic*-type prophylactic rule, whereas we remain bound by *Bostic*.

> appellate court may, but is not required to, apply a presumption of reasonableness. [*Rita v. United States*, - U.S. -, 127 S.Ct. 2456,2462-68 (2007)]. But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.

Gall, 123 S.Ct. at 597.

Arguably, the presumption of reasonableness validated in *Rita*, as recognized in *Gall*, may not apply here, as the district court did not impose a sentence within the advisory Guidelines range, but granted a three-month downward variance from the low end of the range. *See Phinazee*, 515 F.3d at 514; *Kirchhoj*, 505 F.3d at 414-15. Yet, the fact that the sentence imposed is outside the Guidelines range does not give rise to a presumption of unreasonableness, *Gall*, 128 S. Ct. at 597, especially where the variance results in a sentence even more

favorable to the challenging defendant than a within-Guidelines sentence. After determining that the district court made no significant procedural error in calculating the Guidelines range, we must assess the substantive reasonableness of the sentence in light of the totality of the circumstances, giving "due deference" to the sentencing judge, in recognition of his greater familiarity with the case, his superior position to find facts and assess credibility, and the institutional advantage that comes with frequent sentencing of offenders. *Id.* at 597-98.

We have already explained why the district court's failure to explicitly consider § 3553(a)(6) was not a significant procedural error. Defendant maintains the sentence is substantively unreasonable because the three-month downward variance granted in the original sentence is insufficient. Defendant insists that the original amended sentence, imposing a two-year term of probation and no term of imprisonment, was sufficient to comply with the purposes of sentencing. This is said to be clearly evidenced by the fact that the district judge, when he believed he had the discretion to do so because the government had no objection, amended the sentence

to eliminate incarceration. Defendant thus urges us to defer to the district judge's exercise of discretion in the second of the three sentencing rulings, rather than the first and third.

The district judge's ambivalence clearly stemmed in part from his misunderstanding about the government's position, but even more fundamentally from his misunderstanding of the sentence disparities factor. Whether he would have continued to question the fairness of the sentence if he had properly understood the requirements of § 3553 (a)(6) is a matter of sheer speculation. Speculation, however, will not support a holding that the district judge abused his discretion when he initially (and ultimately) granted a three-month downward variance and imposed a sentence of twelve months and a day. To the contrary, the sentencing transcript and opinion vacating the original amended sentence affirmatively demonstrate that the sentence originally (and ultimately) imposed is not unreasonable in length.

No one has challenged the correctness of the advisory Guidelines range identified by the district judge, being fifteen to twenty-one months. After

identifying this range and deciding to grant the government's motion for downward variance based on defendant's substantial assistance, the sentencing judge engaged in a weighing of circumstances. The district judge expressly considered that defendant profited greatly from his unlawful conduct; that he conducted the illegal gambling business for over five years; that he was the organizer of this criminal enterprise and had persuaded other "good people" who trusted him to become involved; and that defendant had a prior criminal history-albeit not a terribly serious one. Hrg. tr. pp. 14-16, JA 200-02. The judge also took note of mitigating circumstances, i.e., that defendant had cooperated with the government and had agreed to forfeit substantial property to the government; that defendant had strong family ties and responsibilities; and that he had been a good citizen, supporting local civic organizations and helping others less privileged than himself. *Id.*; Memorandum and Order p. 2, JA 149. The district judge concluded that a prison sentence of twelve months and a day afforded "adequate deterrence" and "just punishment." Hrg. tr. pp. 16-17, JA 202-03.

The district judge thus appears to have reasonably weighed the totality of the circumstances in arriving at a sentence. The district judge also appears to have reasonably justified the extent of the variance granted. Apart from his contention that the sentence is unreasonably long in comparison with sentences imposed on other local gambling offenders, defendant has not explained why this sentence should be deemed so unreasonably long as to constitute an abuse of discretion. Even if the local sentence disparities issue were deemed to have been timely raised below, the record was not sufficiently developed, as the district court recognized, to enable a sound determination that the other putatively comparable offenders were in fact similarly situated in all relevant respects. Defendant's substantive-unreasonableness argument thus boils down to either (1) a contention that the sentencing judge should have weighed the circumstances differently, or (2) a mere allegation that the sentence is greater than necessary. Both contentions are beyond the scope of proper appellate review for substantive unreasonableness. *See United States v. Sexton*, 512 F.3d 326, 332 (6th Cir. 2008) (recognizing that substantive-unreasonableness review does not look to whether the appellate court would have imposed the

same sentence in the first instance); *Phinazee,* 515 F.3d at 519 (observing that since review is not de novo, the appellate court must be wary to avoid substituting its judgment for that of the district court).

Defendant has not carried his burden of demonstrating that the sentence ultimately imposed represents an abuse of discretion. In fact, he has failed to identify a single Sixth Circuit case in which a sentence reflecting a downward variance from the advisory Guidelines range was vacated because unreasonably long. *See Phinazee,* 515 F.3d at 519. According due deference to the district judge's discretion in assessing the extent of the downward variance warranted by the circumstances properly before him, *see Gall,* 128 S.Ct. at 597-98, we therefore overrule defendant's substantive-unreasonableness challenge as well.

III. CONCLUSION

Notwithstanding the confused nature of post-sentencing proceedings in the district court, we conclude that the sentence originally, and ultimately, imposed is marked neither by clear error that was correctable by the district court under Rule 35(a) of the Federal Rules of Criminal Procedure, nor by other procedural or substantive unreasonableness. Accordingly, we **AFFIRM** the judgment of the district court.

DISSENT

CLAY, Circuit Judge, dissenting. The sentence imposed by the district court in this case is a prime example of a sentencing proceeding gone awry. Indeed, the district court handed down a sentence which was rife with procedural error as a result of its failure to comply with § 3553(a), the Sentencing Guidelines, or Rule 35(a). In short, the sentence imposed by the district court was improper and legally deficient. Thus, it is incumbent upon this Court to vacate the sentence and remand for resentencing. Because the majority goes to great pains to avoid this basic duty in the face of obvious and repeated sentencing error, I respectfully dissent.

I.

A simple recitation of the facts in this case demonstrates that Houston's sentence is procedurally infirm and should therefore be remanded for resentencing. In March of 2006, Houston entered into a plea agreement with the government whereby Houston agreed to plead guilty to the offenses enumerated in a two count bill of information. The bill of information alleged that Houston participated in a conspiracy to conduct an illegal gambling

enterprise between 2000 and 2005 in violation of 18 U.S.C. § 371 as well as a conspiracy to launder the proceeds of an illegal gambling activity in violation of 18 U.S.C. §§ 1956(h) and 1957. Under the terms of the plea agreement, Houston agreed to forfeit upwards of $2 million in money and property and the government agreed to represent that Houston provided substantial assistance by truthfully describing his criminal activity and encouraging others to plead guilty.

Thereafter, on July 19, 2006, Houston appeared before the district court for sentencing where it appears that the district judge referred to the proceedings as having gotten "turned around."[7] During the hearing, defense counsel made a presentation regarding Houston's age, character,

---

[7] Contrary to the majority's contention, I do not entirely attribute the reference to the sentencing getting "turned around" to any "quip" made by the district judge on the record. Indeed, the improprieties that occurred in the instant case are not so easily captured by anyone statement of the district court. Rather, it is clear from simply reading the entire record, including the initial sentencing transcript, that the sentencing was confused and thus the "turned around" reference is appropriate.

business acumen and history of supporting his family, including his elderly mother, and the less fortunate. Houston argued that the district court should take into consideration those personal characteristics and the fact that he observed "the numbers" growing up "as part of a community where playing the numbers was culturally accepted" and impose a term of probation. (JA. at 90)

The district court, however, brushed Houston's arguments aside without discussion and noted in a cursory fashion that Houston was "the organizer of this thing," the "main man" of the gambling conspiracy, and that the sentence was imposed

> [b]ased upon the nature and circumstances of the offense and the time it went on[,] plus your history of working hard, but you have been in a little trouble in your life, not much, but some. Based upon the Guideline range[,] which is what, 15 months, 15 to 21 months. Based upon the fact that you cooperated and the government has made a motion for downward departure under Sentencing Guideline 5K1.1 ....

(JA. at 200) In the course of this explanation, the district court did not discuss the § 3553(a) factors in

any meaningful way. Instead, following this terse explanation, the district court sentenced Houston to a term of 12 months and one day of imprisonment.

After sentencing, Houston filed a "motion for reconsideration of the court's sentencing decision." In the motion, Houston questioned the district court's consideration of his individual characteristics, the adequacy of the district court's explanation at sentencing, and the district court's consideration of unwarranted sentencing disparities. Houston contended that the district court failed to consider unwarranted sentencing disparities because no similarly situated defendant-i.e., individuals who had been convicted of an illegal gambling offense and cooperated with law enforcement-had been sentenced to a term of incarceration by the United States District Court for the Eastern District of Tennessee. Houston, through counsel, averred that defendants in illegal gambling cases who cooperated with the government had routinely been sentenced to probation. Consequently, Houston argued that the district court should similarly impose a sentence of probation rather than a term of incarceration to avoid unwarranted sentencing disparities.

In response to the motion, the district judge stated that he had "considered" Houston's personal characteristics and his history of civic engagement. The district judge, however, did not describe how he considered these characteristics or elaborate on his reasoning for the imposition of the initial 12 month sentence. Nevertheless, the district judge acknowledged that he had not considered "unwarranted sentencing disparities" and that Houston should be resentenced to a term of probation based on the sentences of similarly situated defendants. The district court reached this conclusion after conducting "independent research" and without any input or argument from the government. Although the district court said it knew it was on "questionable legal grounds," the court amended Houston's sentence to reflect a two year term of probation rather than 12 months of incarceration.

A few days later, apparently turned around once again, the district court reversed course and reinstated the 12 month and one day term of incarceration after an objection was lodged by the government. The government alleged that the district court was without jurisdiction to "reconsider" the sentence under Rule 35(a) of the Federal Rules of

Criminal Procedure and that the factual basis upon which the district court made its revised sentencing determination was flawed. The district court agreed that it was without authority to resentence Houston and therefore struck the amended judgment. Thereafter, the district court reinstated Houston's 12 month and one day sentence. The district judge, however, continued to maintain that he had not fairly sentenced Houston and that the 12 month and one day sentence was excessive.

II.

Contrary to the conclusion reached by the majority, these facts demonstrate that the district court committed significant procedural errors that rendered Houston's sentence unreasonable. To uphold such a procedurally infirm sentence, as the majority seems content to do, is to abdicate this Court's responsibility to insure constitutionally sound sentencing practices.

Under *Gall v. United States*, 128 S.Ct. 586, 597 (2007), this Court must "ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as

mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence-including an explanation for any deviation from the Guidelines range." In the instant case, given all of the twists and turns that occurred during sentencing, it is clear that the district court fell well below the procedural benchmarks established by the Supreme Court for at least three reasons.

First, during the initial sentencing there was no indication that the district court considered Houston's arguments regarding his family, cultural history or philanthropy; nor did the district court engage in an adequate explanation of the rationale behind the sentence ultimately imposed. As the Supreme Court recently noted in *Gall*, "[a]fter settling on the appropriate sentence, [the district judge] must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." 128 S.Ct. at 597. Even a cursory review of the sentencing transcript reveals that the district judge did not reference the arguments made by Houston during the brief statement made prior to the imposition of Houston's initial sentence. Thus, in failing to explain

the basis for Houston's sentence, the district court ran afoul of the procedural requirements of *United States v. Booker*, 543 U.S. 220 (2005), and its progeny and should therefore be reversed. *See United States v. Klups*, 514 F.3d 532, 537 (6th Cir. 2008); *United States v. Thomas*, 498 F.3d 336, 340-41 (6th Cir. 2007).

Indeed, the majority acknowledges that the district court did not "fully explain the extent of its consideration of [the] sentencing factors." Slip Op. at 6. Astoundingly, however, the majority refuses to vacate and remand Houston's sentence, finding no fault in the district court's explanation, or lack thereof. This refusal to vacate Houston's sentence flies in the face of well-settled precedent which holds that "[r]eversable procedural error occurs if the sentencing judge fails to 'set forth enough [of a statement of reasons] to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority.'" *United States v. Bolds*, 511 F.3d 568, 580 (6th Cir. 2007) (quoting *Rita v. United States*, 127 S.Ct. 2456, 2468 (2007)). We have long held that "when the judge makes only a conclusory reference to the § 3553(a) factors and does

not address the defendant's arguments regarding application of those factors, then this Court will find the sentence unreasonable." *Klups*, 514 F.3d at 537 (internal quotations and citations omitted); *see also United States v. Liou*, 491 F.3d 334, 339 n.4 (6th Cir. 2007) (noting that this Court has long held that "we will vacate a sentence if the context and the record do not make clear the court's reasoning"). In short, well-established precedent requires reversal where the sentencing court fails to explain to the defendant, and this Court, how it arrived at its sentencing determination, including how it considered defense arguments and the § 3553(a) factors. Contrary to the majority's determination, unexplained or silent consideration of the § 3553(a) factors and Houston's arguments does not satisfy the district court's duty to explain how it chose to exercise its "legal decisionmaking authority." *Rita*, 127 S.Ct. at 2468.

Second, Houston's sentence is rendered unreasonable by the district court's admitted failure to consider unwarranted sentencing disparities pursuant to § 3553(a)(6). Post-*Booker*, district courts must *independently* "'consider all of the § 3553(a) factors' and 'make an individualized assessment based on the facts presented.'" *United States v.*

Sedore, 512 F.3d 819, 828 (6th Cir. 2008) (Clay, J., concurring) (quoting *Gall*, 128 S.Ct. at 596-97); *see also United States v. Wilms*, 495 F.3d 277, 282 (6th Cir. 2007) (noting that a district court must independently consider the § 3553(a) factors at sentencing). On a number of occasions, the Supreme Court has indicated that a district court, when imposing a sentence, may not simply rely on the Guidelines or the Sentencing Commission's recommendations with respect to the appropriateness of a particular sentence. *Gall*, 128 S. Ct. at 596; *Rita*, 127 S.Ct. at 2463. Rather, under the advisory regime announced by *Booker*, the Guidelines may not be used as a crutch or shorthand for the independent exercise of judicial discretion called for by § 3553(a). In particular, § 3553(a)(6) tells "the *sentencing judge* to consider ... the need to avoid unwarranted sentencing disparities," *Rita*, 127 S. Ct. at 2463, "among defendants with similar records who have been found guilty of similar conduct" at sentencing. 18 U.S.C. § 3553(a)(6).

Although this Court noted in *United States v. Simmons*, 501 F.3d 620, 623 (6th Cir. 2007), that "[s]ubsection 3553(a)(6) is concerned with national disparities among the many defendants with similar

criminal backgrounds. convicted of similar criminal conduct," consideration of the factor includes an examination of regional sentencing disparities.[8] As the Supreme Court noted in *Rita*, "the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives, the one, at retail, the other at wholesale." 127 S.Ct. at 2463. The district court's "retail" consideration of the § 3553(a) factors, therefore, necessarily entailed consideration of the regional sentencing patterns highlighted by Houston. Indeed, in *Gall*, the Supreme Court found that a district court considered unwarranted sentencing disparities by inquiring "about the sentences already imposed by a different judge on two of Gall' s codefendants." *Gall*, 128 S.Ct. at 599; *see also Kimbrough v. United States*, 128 S.Ct. 558, 574 (2007) (noting that § 3553(a)(6)

---

[8]The majority, relying on *Simmons*, dismisses the question of local or regional disparities, suggesting that they have no bearing on the district court's consideration of unwarranted sentencing disparities. However, *Simmons* reaches no such conclusion. While *Simmons* stated that a district court could, in its discretion, consider sentencing disparities as between co-defendants, it was silent regarding the interaction between consideration of regional and national sentencing disparities. 501 F.3d at 623-24.

"directs *district courts* to consider the need for unwarranted sentencing disparities-along with other § 3553(a) factors-when imposing sentences. Under this instruction, district courts must take account of sentencing practices in other courts ... " (emphasis in original and internal citations omitted)). Because the district court was required to consider all of the § 3553(a) factors and the district court failed to do so when imposing Houston's sentence, the ultimate 12 month sentence was rendered procedurally unreasonable. *Simmons*, 501 F.3d at 625-26 (noting that a "district judge could also violate procedural reasonableness if the defendant is able to prove that the lack of explicit discussion stems from a complete ignorance of that factor").

Lastly, Houston's sentence was rendered procedurally infirm by the district court's failure to comply with Rule 35(a) in its attempt to correct Houston's sentence. Under Rule 35(a), "[w]ithin 7 days of sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." Fed. R. Crim. P. 35(a). In the instant case, rather than rectifying the "clear error" committed during the initial sentencing, the district court compounded the error. In imposing the

amended sentence, the district court failed to hear arguments from both Houston and the government regarding sentencing disparities or the other § 3553(a) factors. Further, the district court neglected to explain how it considered Houston's arguments regarding his personal characteristics and history of philanthropy in Chattanooga. Thus, both in its initial imposition of the sentence, and in its attempt to correct the sentence initially imposed, the district court imposed a procedurally unreasonable sentence that warrants reversal.

III.

Despite the fundamental and obvious mistakes made by the district court during the sentencings, the majority inexplicably goes to great lengths to avoid remanding this case in order for Houston to be resentenced. As an initial matter, the majority argues that Houston's failure to mention unwarranted sentencing disparities at the conclusion of his sentencing hearing subjects his procedural reasonableness challenge to plain error review on appeal under *United States v. Vonner*, 516 F.3d 382 (6th Cir. 2008). In *Vonner*, this Court applied the rule announced in *United States v. Bostic*, 371 F. 3d 865

(6th Cir. 2004), to procedural reasonableness challenges. Under *Bostic*, a district court must give the parties an opportunity to make objections that were not previously raised to "aid the district court in correcting any error." *Id.* at 873. Any objection not raised by the conclusion of a sentencing hearing is subject to plain error review on appeal. *Id.* In the instant case, Houston's Rule 35(a) motion did in fact bring an objection to the attention of the district court for correction regarding the district court's consideration of his arguments in favor of probation, the adequacy of the district court's sentencing explanation, and the district court's consideration of § 3553(a)(6). In *United States v. Ellis*, 417 F. 3d 931, 933 (8th Cir. 2005), for example, the Eighth Circuit held that a challenge to the mandatory imposition of the Guidelines was preserved despite the fact that it was first raised in a post-sentencing Rule 35(a) motion. The *Ellis* court reasoned that because the trial court was given "an opportunity to correct the error," the objection was subject to review for reasonableness, rather than plain error, on appeal. *Id* The logical force of *Ellis* applies equally to the

instant case to preserve Houston's objection.[9]

---

[9] Although the majority dismisses the Eighth Circuit's holding in *Ellis* as having no weight in this circuit, the persuasiveness of *Ellis'* logic is quite clear: where a defendant raises an objection to the district court through a Rule 35(a) motion and therefore gives the district court an opportunity to respond to an alleged error, plain error review is inappropriate. Contrary to the majority's suggestion, the issue confronting the *Ellis* court was the same issue that we confront here, whether to apply plain error review to a procedural reasonableness challenge (i.e., the district court's application of the Guidelines as mandatory) where a defendant raises an objection in the form of a Rule 35(a) motion. Inasmuch as we have not yet resolved the impact of a Rule 35(a) motion on our standard of review regarding a district court's sentencing determination, *Ellis* is certainly relevant and ought to inform our thinking. Indeed, this Court routinely looks to our sister circuits for guidance when we encounter a legal question that we have not previously passed upon.

Rather than address the wisdom of plain error review under the unusual factual circumstances presented in this case, the majority unthinkingly applies such review in its haste to affirm the district court. Such unreflective application of plain error review not only undermines this Court's duty to review sentences for reasonableness under *Booker*, it is inconsistent with the tenets of plain error review that the majority relies upon, as *Ellis* demonstrates.

Consequently, "[w]hen an objection to a sentence is preserved, we conduct a reasonableness review." *Simmons*, 501 F.3d at 624. In the instant case, under our reasonableness review, based on even a cursory review of the record, it is clear that the sentence imposed by the district court was procedurally unreasonable.

In another effort to avoid remanding Houston's case for resentencing, the majority suggests that the district court did in fact consider unwarranted sentencing disparities because it considered the Guidelines. Contrary to the majority's determination, the district court's consideration of the Guidelines did not cure the district court's failure to consider unwarranted sentencing disparities. Although the Guidelines represent the Sentencing Commission's "rough approximation of sentences that might achieve § 3553(a)'s objectives," including the need to avoid unwarranted sentencing disparities, the district court is required to independently assess and determine whether the § 3553(a) factors support the imposition of a particular Guidelines sentence. *Rita*, 127 S.Ct. at 2464; *Wilms*, 495 F.3d at 282.

Under the majority's rendition of the district court's responsibilities with respect to the § 3553(a) factors, however, a district court applying the Guidelines is free to ignore other factors such as the seriousness of the offense and unwarranted sentencing disparities because such factors are taken into account by the Sentencing Commission when fashioning the Guidelines. Not only does the majority's view render § 3553(a)(6) superfluous, it bears a striking resemblance to the pre-*Booker* sentencing regime. *Wilms*, 495 F.3d at 282; *United States v. Foreman*, 436 F.3d 638,644 (6th Cir. 2006). Indeed, in *United States v. Foreman*, 436 F.3d 638,644 (6th Cir. 2006), this Court noted that "[a] sentence within the Guidelines carries with it no implication that the district court considered the § 3553(a) factors if it is not clear from the record, because, of course, under the Guidelines as mandatory, a district court was not required to consider the § 3553(a) factors. It would be unrealistic to now claim that a Guideline sentence implies consideration of those factors." Because the majority unrealistically suggests that the application of the Guidelines can substitute for independent consideration of the § 3553(a) factors, I respectfully dissent.

IV.

I express no opinion as to what sentence should ultimately be imposed on Houston; however, inasmuch as the district court imposed a sentence that is procedurally infirm, I would vacate Houston's sentence and remand for a sentencing proceeding that would appropriately conform to the mandates of *Booker* and its progeny.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

AMENDED JUDGMENT
IN A CRIMINAL CASE
(For Offenses Committed On or After
November 1, 1987)

UNITED STATES OF AMERICA
v.
JAMES E. HOUSTON

CASE #: 3:06-CR-27-001
Date of Original Judgment: July 19, 2006

David M. Eldridge
Defendant's Attorney

Reason for Amendment:
Correction of Sentence by Sentencing Court
(Fed.R.Crim.P.35(c))

THE DEFENDANT:

[X] pleaded guilty to Counts: 1 and 2 of the Information.

[ ] pleaded nolo contendere to count(s) __ which was accepted by the court.

[ ] was found guilty on count(s) __ after a plea of not guilty

ACCORDINGLY, the Court has adjudicated that the defendant is guilty of the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count #(s)
18 USC §§ 371 and 1955	Conspiracy to Conduct an Illegal Gambling Operation	05/2005	1
18 USC §§ 1956(h) and 1957	Conspiracy to Launder Proceeds of an Illegal Gambling Operation	05/2005	2

The defendant is sentenced as provided in pages 2 through 7 of this judgment and the Statement of Reasons. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and 18 U.S.C. §3553.

[ ] The defendant has been found not guilty on count(s) ___.

[ ] Count(s) ___ [] is [] are dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district

within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the Court and the United States Attorney of material changes in the defendant's economic circumstances.

October 4, 2006
Date if Imposition of Judgment
/s/ James H. Jarvis
Signature of Judge
JAMES H. JARVIS, U.S. District Judge
Name & Title of Judge

Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of *12 months and 1 day.

*This sentence consists of a term of 12 months and 1 day as to each of Counts 1 and 2, to be served concurrently

[*✓] The court makes the following recommendations to the Bureau of Prisons:

*The defendant be designated to FCI Manchester, KY or a facility as close to Knoxville, TN as possible

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district:

[ ] at __[] a.m. []p.m. on ___.

[ ] as notified by the United State Marshal.

[*✓] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before 2 p.m. on ___.

[*✓] as notified by the United States Marshal.

[ ] as notified by the Probation of Pretrial Services Office

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of *3 years .

*This term consists of 3 years as to each of Counts 1 and 2, to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on probation and at least two periodic drug tests thereafter, as directed by the Court.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[✓] The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable.)

[✓] The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

[ ]The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works or is a student, as directed by the probation officer. (Check, if applicable.)

[ ] The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it shall be condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (as set forth below). The defendant shall also comply with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reason;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any pamphemalia related to any

controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics,

and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall provide the probation office with access to any requested financial information.
2. The defendant shall participate in a program of testing and/or treatment for drug and./or alcohol abuse, as directed by the probation officer, until such time as he is released from the program by the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 6. The assessment is ordered in accordance with 18 U.S.C. § 3013.

Totals	Assessment	Fine	Restitution
	$200.00	$	$

[ ] The determination of restitution is deferred until __. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.
[ ] The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximate proportioned payment, unless specified otherwise in the priority order or percentage column below. However, if the United States is a victim, all other victims, if any, shall receive full restitution before the United States receives any restitution, and all restitution shall be paid to the victims before any restitution is paid to a provider of compensation, pursuant to 18 U.S.C. §3664.

Name of Payee	Total Loss*	Restitution Ordered	Priority or %

Totals: $ $

[ ] If applicable, restitution amount ordered pursuant to plea agreement $___

The defendant shall pay interest on any fine or restitution of more than $ 2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

[ ] The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

---

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

[ ] The interest requirement is waived. [] fine and/or [] restitution.

[ ] The interest requirement for the [] fine and/or [] restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A [x] Lump sum payment of $200.00 due immediately, balance due

[ ] not later than _____, or

[ ] in accordance with C, D, E, or F; or

B [ ] Payment to begin immediately (may be combined with C, D, or F); or

C [ ] Payment in equal ____ (e.g., weekly, monthly, quarterly) installments of $ ___ over a period of ___ (e.g. months or years), to commence ____ (e.g., 30 or 60 days) after the date of this judgment; or

D [ ] Payment in ____(e.g., equal, weekly, monthly, quarterly) installments of $ ___ over a period of ___ (e.g. months or years), to

commence ____ (e.g., 30 or 60 days) after the date of this judgment; or

E [ ] Payment during the term of supervised release will commence within 1 (e.g, 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F [ ] Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. Unless otherwise directed by the court, the probation officer, or the United States attorney, all criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, shall be made to **U.S. District Court, 800 Market St., Suite 130, Knoxville, TN 37902.** Payments shall be in the form of a check or a money order, made payable to U.S. District Court, with a notation of the case number including defendant number.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several

Defendant Name, Case Number, and Joint and Several Amount:

[] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[✓] The defendant shall forfeit the defendant's interest in the following property to the United States:

a. Real property having a mailing address of 2008 Igou Crossing, Chattanooga, Tennessee

b. Real property having a mailing address of 128 Indian Valley Road, Huntsville, Alabama

c. Real property having a mailing address of 2508 Castlegate Boulevard, Decatur, Alabama

d. Real property having a mailing address of 2603 Davenport Road, Knoxville, Tennessee

e. Real property having a mailing address of 420 Huntington Ridge Drive, Nashville, Tennessee

f. Real property having a mailing address of 4963 Island Home Road, Maryville, Tennessee

g. Real property having a mailing address of 7625 Valley Green Drive, #202, Las Vegas, Nevada

h. Real property having a mailing address of 4805 Ivy Ridge Drive, #101, Smyrna, Georgia

i. Real property having a mailing address of 1016 Ultra Way, Knoxville, Tennessee

j. $148,966.75 in United States currency

k. $4,000.00 in United States currency

l. Real property having a mailing address of 1311 Brookside Avenue, Knoxville, Tennessee

m. Real property having a mailing address of 1315 Brookside Avenue, Knoxville, Tennessee

n. $208,500.00 in United States currency

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

UNITED STATES OF AMERICA,

v. No. 3:06-cr-27

JAMES E. HOUSTON

MEMORANDUM AND ORDER

On April 19, 2006, the defendant pled guilty to a two-count information charging him with conspiracy to conduct an illegal gambling operation, *i.e.*, "the numbers," in violation of 18 U.S.C. §§ 371 and 1955 (count one) and with conspiracy to launder proceeds of an illegal gambling operation in violation of 18 U.S.C. §§ 1956(h) and 1957 (count two) [*see* Doc. 36]. On July 19, 2006, the court conducted a sentencing hearing in open court and, among other things, imposed a term of imprisonment of twelve months and one day [*see* Doc. 105].

On July 24, 2006, before a written judgment was entered, the defendant filed a motion for reconsideration of the court's sentencing decision [*see* Doc. 108]. In particular, the defendant sought a term

of probation or time in a half-way house as opposed to this term of incarceration. Although the defendant discussed several factors to support his motion, only the following caused some consternation to the court because all others had been fully considered before sentencing:

> 9. Undersigned counsel has practiced before the United States District Court for the Eastern District of Tennessee since 1988 and has been involved in the representation of individuals in a number of gambling prosecutions over the years. These prosecutions have involved video poker machines and illegal book making. To undersigned counsel's knowledge, no participant in these activities, who pled guilty, cooperated, and received a Motion for Downward Departure from the United States, including those who were denominated to be an organizer or leader under the Federal Sentencing Guidelines, have [sic] ever been sentenced to a term of incarceration in the Northern Division of the Eastern District of Tennessee.[1] Undersigned

---

[1]This portion of the brief was supported by the affidavit of David M. Eldridge, attorney of record for

> counsel recognizes that every case is different; however, counsel respectfully suggests that treating similarly situated defendants convicted of similar offenses is a relevant and appropriate consideration for the Court ....

[*See* Doc. 108-1, p.4]. Moreover, in considering the above, the court was mindful of the following critical representation by defense counsel:

> (11) Undersigned counsel is authorized to represent to this Court that the United States does not oppose this motion for reconsideration if the Court deems it appropriate to reconsider Mr. Houston's sentence.

[*Id.* at p.5].

On July 27, 2006, this court filed a memorandum and order [Doc. 110] in which it granted defendant's motion to the extent that no term of incarceration was imposed; rather, a term of probation of two years would be ordered. In reaching this conclusion, the court focused on the "need to avoid unwarranted sentence disparities among

---

the defendant [*see* Doc. 108-2, p.2].

defendants with similar records who have been found guilty of similar conduct," *see* 18 U.S.C. § 3553(a)(6), and made the following observation:

> The court has now independently researched this area and concludes that defense counsel is indeed correct. Thus, under these unique circumstances, the court concludes that it would be inconsistent and unjust to sentence this defendant to a term of incarceration, when all other similarly situated defendants have received a term of probation. If anything, this court strives mightily to impose sentences in criminal cases in a fair and consistent manner. In light of this new information, the court is of the definite and firm opinion that it has not done so in this particular case.

[*See id.*, pp.2-3].

Therefore, the court held that "a sentence of twelve months and one day is greater than necessary to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment for the offense, or to afford adequate deterrence." [*Id.* at pp.3-4]. The court further observed "that the original sentence was too harsh and greater than necessary to

comply with the purposes set forth in 18 U.S.C. § 3553(a)(2)" [*id.* at p.4]. Moreover, given the fact that defense counsel represented that the government had no objection to this motion for reconsideration, the court believed this matter was fully concluded and entered a written judgment on July 31, 2006, reflecting this change [*see* Doc. 112].

Less than three days later, however, the government cries "Foul" in the strongest possible language, and now seeks to strike that amended judgment [*see* Doc. 116].[2] The defendant has timely responded to the government's motion [*see* Doc. 133], and the government has in turn replied to that response [*see* Doc. 136]. Thus, this matter is once again ripe for adjudication. For the reasons that follow, the court is constrained to grant the government's motion whereby an amended judgment

---

[2]Again, it must be emphasized that this court never entered a written judgment reflecting the original term of imprisonment of 12 months and one day. The court assumes that the government is referring to an "amended judgment" in the sense that the written judgment "amends" the original oral sentence. The court takes no issue with this description.

will be entered reflecting the sentence of twelve months and one day imposed on July 19, 2006.

I.

The court will first address a procedural issue raised by the government in its motion. The government complains that it was entitled to ten days within which to respond to defendant's motion for reconsideration filed on July 24, 2006. According to its calculations, the government had up to and including August 7, 2006, within which to do so, and the court did not allow that much time to pass before considering the merits of defendant's motion for reconsideration.

Ordinarily, the government would be correct. The government or the defendant for that matter would have ten days to respond to a "garden variety" motion in a criminal case, unless a motion for extension of time were filed and granted. It is also undisputed the court did not wait for the usual amount of time to expire as the memorandum and order at issue was filed just three days after defendant's motion for reconsideration.

The government must be reminded, however, that defense counsel represented in no uncertain terms that the government had no objection to that motion for reconsideration. Furthermore, this court was of the opinion that if the defendant were, in effect, to be resentenced, this resentencing must occur within seven days after the sentence had been orally imposed. The court's opinion was based on the unambiguous language of Federal Rule of Criminal Procedure 35, which requires any correction based on "arithmetical, technical, or other clear error" to occur within seven days after sentencing, *i.e.*, seven days after "the oral announcement of the sentence." Fed. R. Crim. P. 35(a) and ©. According to the court's calculation, this resentencing had to occur on or before July 28,2006.[3] The Sixth Circuit has recently confirmed this court's interpretation of Rule 35, holding that "Rule 35 requires a district court to actually resentence a defendant within the seven-

---

[3]The court calculates this date pursuant to Federal Rule of Criminal Procedure 45, which dictates that when computing time for purposes of the criminal rules, the court is to exclude the day of the act that begins and exclude intermediate Saturdays, Sundays, and legal holidays, since the period at issue is less than 11 days. Fed. R. Crim. P. 45(a)(1)-(2).

day period therein prescribed." *United States v. Vicol*, 460 F.3d 693, 69_, (6th Cir. 2006). Otherwise, the district court is deprived of jurisdiction. *Id.* at 69_. Consequently, had the court waited until August 7, 2006, for the government's response, as the government now suggests, the court would have been totally deprived of jurisdiction to resentence this defendant. The wait in and of itself would have mooted defendant's request. Moreover, the court saw no reason to wait in light of defense counsel's representation that the government had no objection to the court reconsidering the defendant's sentence. The court therefore finds no merit to the government's position on this procedural issue under these circumstances.

II.

In its pending motion, the government also represents that there was some sort of misunderstanding between defense counsel and the attorney for the government. The government specifically states the following:

> When the undersigned discussed this proposed motion with defense counsel, he was assured by defense counsel that any statement of the position of the

> United States to be included in the forthcoming motion would be e-mailed to the undersigned for approval prior to the filing of the motion. No e-mail or any other communications were sent to the undersigned prior to filing. The language used in Paragraph 11 was not cleared by the United States prior to filing, and, to the extent that it implies that the United States does not oppose the reduction of sentence sought by the motion does not accurately communicate the position of the United States. While the undersigned told defense counsel that he would defer to the Court as to whether the Court wanted to reconsider the sentence, in no way did the undersigned indicate to defense counsel that the United States did not oppose a reduction in the sentence initially pronounced.

[*See* Doc. 116, pp.1-2].

In response, defense counsel candidly admits that he informed the attorney for the United States that he would e-mail the precise language that would be used to describe the United States' position and that he simply failed, "through oversight," to do so [*see* Doc. 133, p.3]. Defense counsel apologizes to the

government's attorney and to the court. Nevertheless, in light of the government's position, as will be more fully discussed below, the government's own description of its conversation with defense counsel is inconsistent with its present position. It is also very troublesome to the court.

The government now states, in no uncertain terms, that this court has no jurisdiction to reconsider this or any other resentence. If that be the case, the court is hardpressed to understand why that message was not unequivocally communicated to defense counsel prior to the filing of the motion to reconsider. In other words, it did not really matter what was contained in that motion since it is the government's universal position that a motion to reconsider this or any other sentence, except within the narrow confines of Rule 35(a) or 18 U.S.C. § 3582, is not allowed. Obviously, any motion filed by defense counsel in this case had to be based on something other than Rule 35(a) and 18 U.S.C. § 3582, and the attorney for the government was undoubtedly cognizant of that fact.

And, unfortunately for the defendant, the government is correct. As the Sixth Circuit has

observed in *United States v. Durham*, 178 F.3d 796, 800 (6th Cir.), *cert. denied*, 528 U.S. 1033 (1999), Rule 35© (which is now incorporated in Rule 35(a)) does not give a district court jurisdiction to reconsider its sentence due to a perceived misinterpretation of sentencing factors. The Sixth Circuit has even more recently reaffirmed this principle in *United States v. Dotz*, 455 F.3d 644, 648 (6th Cir. 2006): "In the sentencing context, there is simply no such thing as a 'motion to reconsider' an otherwise final sentence .... " Here, contrary to defendant's insistence, the "otherwise final sentence" was imposed on July 19, 2006.

In view of these authorities, the court is left with no alternative but to reimpose the original sentence. For the record, this court was acutely aware that it was on legal ground of questionable firmness when it granted defendant's motion to reconsider; nevertheless, it did so only because of the representation that the government would have no objection to a reconsideration of defendant's sentence and because the court did not fully consider one of the factors set forth in 18 U.S.C. § 3553(a), *i.e.*, sub-part 6 which *requires* a consideration of "unwarranted sentence disparities among defendants with similar

records who have been found guilty of similar conduct[.]" The court was of the firm and definite opinion that it failed to do so, and it is still of that same opinion.

Although the government relies on six cases from the Eastern District of Tennessee to support its position that the basis for any reduction of defendant's sentence to probation is "flawed," [*see* Doc. 116, p.2], the court disagrees. As defendant points out, all cases relied on by the government are from the Chattanooga Division of this district. When this court entered its memorandum and order on July 27, 2006, the undersigned had only reviewed the cases in the Knoxville division since that was the sole basis set forth in the defendant's motion for reconsideration. The court's review of those cases fully supported defendant's position. Consequently, this court was concerned that it had not been consistent in its sentencings and, in particular, had not been fair to this defendant. It must be emphasized too that the government's brief does not make it clear as to the extent of those defendants' cooperation nor the amount of assets which those defendants forfeited to the government. All of this makes it extremely difficult to accurately compare

those defendants to this defendant. What is clear, however, is that Mr. Houston's cooperation was extensive and the amount of assets forfeited was, by any measure, substantial. In the end, however, all of this matters not because this court is constrained to follow the law in light of the government's revised position.

III.

Therefore, this court is compelled to reimpose the sentence originally announced on July 19, 2006. Accordingly, the government's motion to strike amended judgment [Doc. 116] is hereby GRANTED to the extent that the judgment imposed on July 31, 2006 [Doc. 112] is VACATED. The Clerk is DIRECTED to prepare an appropriate amended judgment reflecting that the defendant is to serve a term of incarceration of **twelve (12) months and one (1) day**. All other aspects of that original judgment are likewise AFFIRMED.

ENTER:

/s/ James H. Jarvis
UNITED STATES DISTRICT JUDGE

VII. POST-CONVICTION PROCEDURES

Rule 35. Correcting or Reducing a Sentence

(a) Correcting Clear Error.

Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

(b) Reducing a Sentence for Substantial Assistance.

(1) In General.

Upon the government's motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.

(2) Later Motion.

Upon the government's motion made more than one year after sentencing, the court may reduce a

sentence if the defendant's substantial assistance involved:

(A) information not known to the defendant until one year or more after sentencing;

(B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing; or

(C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.

(3) Evaluating Substantial Assistance.

In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance.

(4) Below Statutory Minimum.

When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 28, 1983, eff. Aug. 1, 1983; Oct. 12, 1984, eff. Nov. 1, 1987; Apr. 29, 1985, eff. Aug. 1, 1985; Oct. 27, 1986, eff. Nov. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 26, 2004, eff. Dec. 1, 2004)

(c) "Sentencing" Defined.

As used in this rule, "sentencing" means the oral announcement of the sentence.

Section 3553. Imposition of a sentence

(a) Factors To Be Considered in Imposing a Sentence. - The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider -

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed -

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for -

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); an

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by

the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement -

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.(!1)

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

No. 08-968

In the Supreme Court of the United States

JAMES E. HOUSTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
THOMAS E. BOOTH
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court correctly concluded that petitioner's sentence did not rest on any "clear error" that could be corrected pursuant to Rule 35(a) of the Federal Rules of Criminal Procedure.

2. Whether the district court committed reversible plain error by sentencing petitioner without expressly considering other gambling-conspiracy sentences from the Northern Division of the Eastern District of Tennessee.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and rules:

Statutes and rules—Continued: Page

In the Supreme Court of the United States

No. 08-968

JAMES E. HOUSTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B55) is reported at 529 F.3d 743. The memorandum and order of the district court (Pet. App. D1-D13) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 2008. A petition for rehearing was denied on October 30, 2008 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on January 26, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Pursuant to a guilty plea in the United States District Court for the Eastern District of Tennessee, peti-

tioner was convicted of one count of conspiracy to conduct an illegal gambling business involving a numbers lottery, in violation of 18 U.S.C. 371 and 1955, and one count of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h) and 1957(a). The district court sentenced petitioner to 12 months and one day of imprisonment, to be followed by three years of supervised release. Pet. App. C1-C6. The court of appeals affirmed. *Id.* at B1-B55.

1. Beginning in 2000, petitioner was the leader of an illegal gambling business in Tennessee and elsewhere. Petitioner's operation mimicked a legal state lottery; winners were paid according to the outcome of legal, state-run lotteries in Illinois and Georgia, but petitioner's payouts were better than those for the state lotteries. Petitioner and his subordinates laundered the proceeds from the illegal business operation by commingling them with legitimate proceeds and purchasing real estate in petitioner's name and nominee names. Gov't C.A. Br. 4-6; Presentence Investigation Report ¶¶ 10, 13 (PSR).

2. Petitioner was charged with one count of conspiracy to conduct an illegal gambling business involving a numbers lottery, in violation of 18 U.S.C. 371 and 1955, and one count of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h) and 1957(a). Pursuant to a plea agreement, petitioner pleaded guilty to the charges and agreed to forfeit money and property obtained as a result of his gambling operation. The government agreed to file a motion for a downward departure at sentencing based on petitioner's substantial assistance to the government. Pet. App. B3-B4.

a. The PSR calculated petitioner's advisory Sentencing Guidelines range as 15 to 21 months, based on a total

offense level of 14 and a criminal history category of I. PSR ¶ 75. Petitioner filed a statement that he had no objections to the PSR's calculations.

Both in a written memorandum and at the sentencing hearing, petitioner requested a sentence of probation, based on his strong family ties, steady employment, community involvement, and minimal criminal history. Def.'s Sent. Mem. 2-14; Sent. Tr. 6-10. The government filed its substantial-assistance motion and represented that any "lawful sentence" would be acceptable. *Id.* at 10.

At a hearing on July 19, 2006, petitioner was sentenced. The district court complimented petitioner on his "good" sentencing memorandum, and it granted the government's motion for a downward departure. Sent. Tr. 6, 14. The court denied the request for a sentence of probation, however, and it imposed a sentence of 12 months and one day, to be followed by three years of supervised release.[1] The court stated that the sentence reflected that petitioner was the "main man" in the criminal enterprise and that it would provide "adequate deterrence" and "just punishment" so that petitioner would "never do this again." *Id.* at 16-17.

At the conclusion of sentencing, the district court asked whether the parties "ha[d] any objection to what [the court] said in the sentence." Sent. Tr. 20. Petitioner made no objection.

b. On July 24, 2006, five days after sentencing but before a written judgment was entered, petitioner moved for reconsideration of the sentence on the ground

---

[1] At petitioner's request, the district court imposed a term of imprisonment of 12 months and one day, rather than 12 months, so that petitioner would be eligible to earn good-time credit toward a shorter sentence. Sent. Tr. 19.

that his sentence was greater than necessary to comply with the purposes of 18 U.S.C. 3553(a)(2). Petitioner alleged that the district court had not adequately considered his history of strong family ties and good works. In addition, petitioner argued that his sentence was disproportionately harsh compared to sentences imposed on other similarly situated defendants in that division of the court, and that the district court should have made that comparison pursuant to 18 U.S.C. 3553(a)(6), which requires that a sentencing court consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." Petitioner's attorney averred in an affidavit that he had handled gambling cases in the district court since 1988 and that in that time, no defendant in the Northern (Knoxville) Division of the Eastern District of Tennessee who had pleaded guilty to running a gambling business, cooperated, and received a downward departure for substantial assistance had ever been sentenced to a term of imprisonment. Finally, petitioner represented that the government did not oppose his motion for reconsideration. Pet. App. B5-B7; Mem. in Supp. of Mot. for Reconsideration of Sent. Decision 3, 5-6.

On July 27, 2006, the district court granted petitioner's motion, vacated the judgment, and imposed a sentence of two years of probation. See Pet. App. B7-B8, D3-D4. The court stated that it had "previously considered" petitioner's age, family ties, good works, substantial assistance, and forfeiture of assets involved in the criminal conspiracy. Mem. & Order 2 (July 27, 2006). The court found "most compelling," however, the affidavit from petitioner's attorney, which raised an issue of disparity that the court had not considered. *Ibid.* The

court stated that it had "independently researched" the question and had confirmed petitioner's factual contention. Accordingly, "under these unique circumstances," the court concluded that a prison term was too harsh and greater than necessary to achieve the purposes of sentencing. *Ibid.* On July 31, 2006, the court issued a written judgment.

c. On August 3, 2006, the government moved to strike the new judgment on several grounds. First, the government pointed out that the court's authority to resentence petitioner under Rule 35(a) of the Federal Rules of Criminal Procedure was limited to correcting "a mathematical, technical, or other clear error." Second, the government noted that petitioner had incorrectly stated the government's position on his Rule 35(a) motion, which had led the court to act on the motion without giving the government an opportunity to respond.[2] Third, the government asserted that at least six cooperating gambling defendants had received prison sentences in the Southern (Chattanooga) Division of the Eastern District of Tennessee, and that petitioner's gambling operation had been "far larger" than these defendants' operations. Pet. App. B8; Mot. to Strike Am. J. 1-3; see also Pet. App. D7.

d. The district court granted the government's motion, vacated the July 31, 2006, judgment, and reimposed the original sentence of 12 months and one day, to be followed by three years of supervised release. Pet. App. C4, C6, D1-D13. The court acknowledged that it had

---

[2] Although the government did not initially make clear to petitioner's counsel that it would oppose the motion, it requested the opportunity to approve any statement of its position; petitioner then inadvertently filed the motion, without further consultation, representing that the government did not oppose reconsideration. Pet. App. D9-D10.

been "acutely aware that it was on legal ground of questionable firmness" when it modified petitioner's sentence. *Id.* at D11. The court stated that it had nonetheless modified the sentence in light of the government's apparent acquiescence and because the court had not considered sentencing disparities within the Northern Division of the district. *Ibid.* Indeed, the court thought that 18 U.S.C. 3553(a)(6) "*requires*" it to consider that form of sentencing disparity and that it had erred at sentencing by not doing so. *Id.* at D11-D12. The court explained, however, that such an error was not a sufficient basis to grant resentencing under the limitations of Rule 35(a). See *id.* at D13.

3. The court of appeals affirmed by a divided vote. Pet. App. B1-B55.

a. The court of appeals first concluded that the district court was correct to strike the amended judgment. The court noted that the district court had committed no "arithmetical" or "technical" error, so that the only basis under Rule 35(a) for changing the sentence would be some "other clear error." Pet. App. B12, B13 (quoting Fed. R. Crim. P. 35(a)). The court of appeals discerned no clear error.

Petitioner presented two possible bases for finding clear error in the original sentence. First, petitioner argued that the district court had inadequately considered petitioner's mitigating circumstances. The court of appeals concluded that that contention was without merit, because the district judge had expressly said in granting the Rule 35(a) motion that he *had* considered those circumstances. Pet. App. B18; see *id.* at B7.

Second, petitioner relied on the sentencing comparisons that he had submitted in an affidavit from his counsel along with the motion for reconsideration. The court

of appeals concluded that any failure to consider purported disparities within the Northern Division was not clear error. "[T]he sentence disparities issue had not been raised by [petitioner] at the time of sentencing and there was no reason to believe it was particularly relevant." Pet. App. B21. And the court concluded that the district court was not *required* by Section 3553(a)(6) to consider disparities within a single division of the district court: while "[t]he district judge, in his discretion, might have considered local disparities to be a relevant consideration if timely raised," *id.* at B23, Section 3553(a)(6) "is concerned with *national* disparities," *id.* at B21 (quoting *United States* v. *Simmons*, 501 F.3d 620, 623 (6th Cir. 2007)). Relying on this Court's decision in *Gall* v. *United States*, 128 S. Ct. 586 (2007), the court of appeals explained that the district court had properly considered the question of national disparity by correctly applying the advisory Sentencing Guidelines. Pet. App. B22-B23 (citing *Gall*, 128 S. Ct. at 599). Accordingly, the court of appeals concluded that the district court had not committed any clear error, and that there was no basis for resentencing petitioner under Rule 35(a).

b. The court of appeals also determined that the purported failure to consider local sentencing disparities at the original sentencing did not warrant reversal for procedural unreasonableness. The court explained that petitioner had not timely objected to the district court's failure to consider this information, so he was limited to seeking review for plain error. Pet. App. B26-B27. Under that standard, the court of appeals concluded, petitioner could not show that the district court had committed reversible plain error, for essentially the same reasons that petitioner could not show clear error under

Rule 35(a): the sentence was "not procedurally infirm because [the district judge] failed to consider an unasserted, non-mandatory [sentencing] factor." *Id.* at B28.

c. Finally, the court of appeals concluded that petitioner's below-Guidelines sentence was substantively reasonable under all the circumstances and that the district court had "reasonably weighed the totality of the circumstances in arriving at a sentence." Pet. App. B35; see *id.* at B30-B36.

d. Judge Clay dissented. Pet. App. B38-B55. He concluded that petitioner's Rule 35(a) motion had preserved his sentencing challenges for *de novo* review rather than plain-error review. *Id.* at B50-B53. Applying that less deferential standard, he concluded that the district court had not adequately considered petitioner's personal history or explained the reasoning behind the sentence. *Id.* at B44-B45. Second, he concluded that the court had also failed to consider the existence of sentencing disparities under Section 3553(a)(6). *Id.* at B46-B50. Third, Judge Clay thought that the district court's later-vacated order in response to petitioner's Rule 35(a) motion, granting petitioner's requested sentence of probation, had also been procedurally unreasonable. He contended that the district court should have entertained new arguments and explained the new sentence more fully. *Id.* at B49-B50.

ARGUMENT

Petitioner contends that the courts of appeals are divided over the meaning of the terms "other clear error" in Rule 35(a) and "sentencing disparities" in Section 3553(a)(6). There is no conflict on either issue meriting this Court's review, and in any event petitioner's case would not implicate any such conflict. Petitioner

did not preserve his procedural-reasonableness claim; he cannot obtain relief under any interpretation of Rule 35(a); and he cannot show plain error on appeal. Further review therefore is not warranted.

1. Petitioner contends (Pet. 12-19) that further review is warranted to resolve a circuit conflict over the standard for showing "clear error" under Rule 35(a). That contention lacks merit.

a. Under 18 U.S.C. 3582(c)(1)(B), a sentencing court may not modify a term of imprisonment once it has been imposed, except as expressly permitted by Rule 35(a) or by statute. Rule 35(a) provides that within seven days after sentencing, a district court may correct a sentence that resulted "from arithmetical, technical, or other clear error." That authority is "very narrow," as the Rule's drafters explained. Fed. R. Crim. P. 35(c) advisory committee's note (1991) (1991 Note) (explaining that "[t]he authority to correct a sentence under this subdivision is intended to be very narrow and to extend only to those cases in which *an obvious error or mistake* has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case to the trial court") (emphasis added).[3] As the advisory committee explained, Rule 35(a) was not intended "to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines or for the court simply to change its mind about the appropriateness of the sentence." *Ibid.* Nor was Rule 35(a) intended to "relax any requirement that the parties state all objections to a sentence at or before the sentencing hearing." *Ibid.*

---

[3] Rule 35(a) was originally Rule 35(c) but was redesignated in 2002. Fed. R. Crim. P. 35(a) advisory committee's note (2002).

b. Those principles make clear that the district court was correct in determining that it could not revisit petitioner's sentence pursuant to Rule 35(a). While petitioner contends that there is a "circuit split" over what constitutes "clear error" under Rule 35(a), Pet. 12, he identifies no substantive difference between the standards applied in the cases he cites. And he identifies *no* court of appeals that would permit resentencing on the grounds petitioner has advanced.

Here, the court of appeals explained that establishing "clear error" under Rule 35(a) requires showing that the error "obviously 'would have resulted in remand by this Court.'" Pet. App. B14 (quoting *United States* v. *Arroyo*, 434 F.3d 835, 838 (6th Cir. 2006)). As petitioner notes, the Eleventh Circuit applies a similar standard. See *United States* v. *Lett*, 483 F.3d 782, 788 (2007), cert. denied, 129 S. Ct. 31 (2008). Petitioner contends (Pet. 17) that *Lett* and the decision below are contrary to the law of several other circuits. This Court denied a petition for a writ of certiorari in *Lett* that made similar assertions based on many of the same cases. In fact, no other court of appeals has adopted a materially different standard of permissible Rule 35(a) relief.

For instance, in *United States* v. *Donoso*, 521 F.3d 144 (2008) (per curiam), the Second Circuit followed the advisory committee's admonition that Rule 35(a) permits post-sentencing correction by the district court only in instances of "obvious error or mistake" that "would almost certainly result in a remand of the case to the trial court for further action." *Id.* at 146 (quoting *United States* v. *Abreu-Cabrera*, 64 F.3d 67, 72 (2d Cir. 1995)). Although the court of appeals recognized that it had not previously answered the precise question of law that was the basis of the revised sentence in that case—whether

a district court may impose a consecutive sentence under certain circumstances, *id.* at 147—the court proceeded to hold that the reasoning of one of its precedents "in a slightly different context" "compel[led] the conclusion" that the district court lacked the authority to impose such a consecutive sentence, *id.* at 148, 149. The Second Circuit reached that conclusion not only because the district court had "erred" in imposing the consecutive sentence, but "[f]urther, because, on appeal from that sentence, [the court of appeals] would 'almost certainly' have remanded" in light of circuit precedent. The court therefore held that the initial sentence constituted "clear error" subject to correction under Rule 35(a). *Id.* at 149. That certainty-of-remand standard is consistent with the rule applied in this case and in *Lett*.[4]

The First Circuit's decision in *United States* v. *Goldman*, 41 F.3d 785 (1994), cert. denied, 514 U.S. 1007 (1995), is even less helpful to petitioner. The district court in that case sentenced Goldman based upon the court's mistaken impression that he had no prior drug conviction when, "[i]n fact," he did (which made the maximum sentence life imprisonment). *Id.* at 789. The district court found that its error was "clear" and imposed a longer sentence, and Goldman did not appeal the obvi-

---

[4] Petitioner also cites (Pet. 15) an earlier Second Circuit decision, *United States* v. *Waters*, 84 F.3d 86 (per curiam), cert. denied, 519 U.S. 905 (1996). Even without the subsequent clarification of circuit law in *Donoso*, the decision in *Waters* would not create a conflict: the court of appeals simply upheld the district court's determination that it "clear[ly]" did not consider a Sentencing Commission policy statement that "courts are required to consider" in sentencing. *Id.* at 90. Petitioner identifies no inconsistency between that standard and the decision below.

ousness of the error; he contested the changed sentence on other grounds. *Ibid.*[5]

As explained below, see pp. 16-17, *infra*, there was no error in this case at all. But even if the district court had erred by not examining Northern Division sentencing history at petitioner's hearing, that error was not *clear* error under any circuit's approach to Rule 35(a). Accordingly, this is not an appropriate case in which to examine how fully consistent the circuits' approaches are.

2. Petitioner also contends that the courts of appeals are divided on whether the sentencing factor set out in Section 3553(a)(6) involves consideration of local as well as nationwide sentencing disparities. This Court's decision in *Gall* v. *United States*, 128 S. Ct. 586 (2007), has substantially resolved any dispute over what *may* be considered within the scope of Section 3553(a)(6). Petitioner suggests that uniformity of sentences within a particular division *must* be considered at every sentencing proceeding. This case does not squarely present any such question, because petitioner failed to preserve it and cannot establish reversible plain error.

a. In *Gall*, this Court reaffirmed that reducing sentencing disparity is one of the principal considerations that the Sentencing Commission takes into account in formulating the advisory Sentencing Guidelines. See 128 S. Ct. at 599 ("[A]voidance of unwarranted disparities was clearly considered by the Sentencing Commis-

---

[5] Petitioner also cites (Pet. 16) *United States* v. *Ellis*, 417 F.3d 931 (8th Cir. 2005), which held that a defendant could object to the mandatory Sentencing Guidelines in a Rule 35(a) motion, *id.* at 933; and *United States* v. *Mejia-Pimental*, 477 F.3d 1100 (9th Cir. 2007), which did not involve Rule 35(a) at all. Neither case is apposite, and neither furnishes evidence of a circuit conflict on the questions presented.

sion when setting the Guidelines ranges."); see also, *e.g.*, *Rita* v. *United States*, 551 U.S. 338, 354 (2007). The Commission's work necessarily considers sentencing disparity on a nationwide scale, and it plainly was that disparity that principally motivated the Sentencing Reform Act, including Section 3553. See, *e.g.*, *United States* v. *Booker*, 543 U.S. 220, 250, 252, 253, 255, 256, 267 (2005); *id.* at 292 (Stevens, J., dissenting in part). Accordingly, the Court stated, a district court "necessarily [has given] significant weight and consideration to the need to avoid unwarranted disparities" when the court has "correctly calculated and carefully reviewed the Guidelines range." *Gall*, 128 S. Ct. at 599.

The Court also confirmed in *Gall*, however, that a district court *may* consider both "unwarranted disparities" and "unwarranted *similarities*" on a more individualized level, as when considering whether co-defendants should receive similar sentences for the same basic offense. 128 S. Ct. at 600. In *Gall*, the district court concluded that one defendant had voluntarily withdrawn from the conspiracy and therefore warranted a less severe sentence than the co-defendants, and this Court confirmed that consideration of that fact was procedurally proper. See *ibid.*

This Court's decision in *Gall* substantially resolved any pre-existing debate over whether sub-national sentencing disparity *may* be considered in the sentencing analysis, but *Gall* also confirmed that a district court may act entirely reasonably if it does not do so. The advisory Guidelines themselves take into account the concern with disparity, and a district court "necessarily g[ives] significant weight and consideration" to the Section 3553(a)(6) factor when it "correctly calculate[s] and

carefully review[s] the Guidelines range." *Gall*, 128 S. Ct. at 599.

Consistent with *Gall* and the decisions of other courts of appeals, the decision below confirms that a district court *may* consider evidence of local disparities of the sort petitioner belatedly raised. See Pet. App. B23 ("The district judge, in his discretion, might have considered local disparities to be a relevant consideration if timely raised."); accord *United States* v. *Presley*, 547 F.3d 625, 632 (6th Cir. 2008) (confirming that a district court may in its discretion, but is not required to, consider disparity between co-defendants); *United States* v. *Wittig*, 528 F.3d 1280, 1285-1286 (10th Cir. 2008) (same), cert. denied, No. 08-779 (Apr. 20, 2009).

Most of the cases on which petitioner relies considered disparity among co-defendants before this Court clarified the law in *Gall*, or disparities that were justified because the defendants were not similarly situated. See, *e.g.*, *United States* v. *Boscarino*, 437 F.3d 634, 637-638 (7th Cir. 2006) (rejecting argument that giving lower sentence to defendant who pleaded guilty was an impermissible "disparity"), cert. denied, 127 S. Ct. 3041 (2007). The remainder considered the entirely distinct question whether a district court may rely on factors specific to a particular setting or jurisdiction in evaluating the seriousness of a crime, and concluded that courts can do so *notwithstanding* the resulting disparity between districts. See, *e.g.*, *United States* v. *Cavera*, 550 F.3d 180, 195 (2d Cir. 2008) (en banc), petition for cert. pending, No. 08-1081 (filed Feb. 23, 2009). None of these cases considers a factor like the one petitioner wished the district court to weigh: a purported disparity among sentences handed down not within a single State or a single federal district, but within a single *division*

of a single district. And petitioner identifies no post-*Gall* case holding that a district court commits procedural error—despite thoroughly considering the applicable Guidelines range—simply because the court does not also consider the question of intra-division disparity, even in the absence of any submission on the subject from either party.

b. Even if there were a conflict on the question whether failure to consider intra-district disparity is procedural error, this would be an inappropriate case in which to consider it, because petitioner cannot satisfy the standard of review necessary to obtain reversal.

The court of appeals correctly concluded that petitioner forfeited his procedural-error claim and is limited to seeking review for plain error. Petitioner does not challenge that holding, and it is correct.[6] When, as here, the district court invites the parties at the conclusion of

---

[6] Petitioner does not argue in this Court (as Judge Clay contended in his dissent below, Pet. App. B50-B53) that his motion for relief under Rule 35(a) properly preserved the sentencing-disparity issue for *de novo* review on appeal. Any such argument would lack merit. Rule 35(a) was not intended to "relax any requirement that the parties state all objections to a sentence *at or before* the sentencing hearing." 1991 Note (emphasis added). Because Rule 35(a) requires a showing of clear error, it is not a vehicle for belatedly preserving issues so as to avoid the plain-error standard of review on appeal. The Eighth Circuit's decision in *Ellis*, on which Judge Clay relied, is inapposite. After *Blakely* v. *Washington*, 542 U.S. 296 (2004), but before *Booker*, Ellis filed a Rule 35(a) motion to challenge the application of mandatory Sentencing Guidelines; the Eighth Circuit held that after *Booker*, the application of mandatory Guidelines *was* "clear error," and it therefore remanded for resentencing under the advisory Guidelines. *Ellis*, 417 F.3d at 933-934. *Ellis* does not support the notion that a Rule 35(a) motion, even if it does *not* meet the "clear error" standard for relief under that Rule (as petitioner's does not), can still preserve for *de novo* review a claim not timely made at sentencing.

sentencing to raise any objections to the procedure by which it arrived at and explained the sentence, a party who fails to object is thereafter limited to plain-error review. Fed. R. Crim. P. 52(b). "[N]o court of appeals * * * has rejected this * * * approach to clarifying objections to a criminal sentence." *United States* v. *Vonner*, 516 F.3d 382, 391 (6th Cir.) (en banc), cert. denied, 129 S. Ct. 68 (2008). Indeed, courts of appeals have expressly applied that approach to claims of failure to consider Section 3553(a)(6). See, *e.g.*, *United States* v. *Barron*, 557 F.3d 866, 868 (8th Cir. 2009). And this Court has denied numerous petitions for writs of certiorari contending that plain-error review should not apply to procedural errors forfeited at sentencing. See, *e.g.*, *Gomez* v. *United States*, 129 S. Ct. 1616 (2009) (No. 08-7778); *Vasquez-Rodriguez* v. *United States*, 129 S. Ct. 1612 (2009) (No. 08-7046); *Vaughn* v. *United States*, 129 S. Ct. 998 (2009) (No. 08-6064); *Commodore* v. *United States*, 129 S. Ct. 487 (2008) (No. 07-11206).

Petitioner cannot establish that the district court committed reversible plain error by failing to consider intra-division sentencing disparity. First, as the court of appeals pointed out, neither Section 3553(a)(6) nor the decisions interpreting it require district courts to discuss the unwarranted-disparities factor in *every* case, including one in which it is neither raised by a party nor obviously relevant on the face of the record. See Pet. App. B20-B21. Petitioner would have to establish that failure to consider all forms of disparity—"within a district court, across districts, within and across circuits, and nationally," Pet. 26—is not only "error," but "plain" error. See *United States* v. *Olano*, 507 U.S. 725, 732 (1993). Petitioner cannot make that showing. Cf. *Gall*, 128 S. Ct. at 599 ("Had [a party] raised the issue, spe-

cific discussion of [another Section 3553(a) factor] might have been in order, but it was not incumbent on the District Judge to raise every conceivably relevant issue on his own initiative.").

Second, even had the contents of petitioner's later submission been before the district court at sentencing, that submission would not have raised such significant evidence of disparity that the district court would have committed procedural error by not addressing it. Petitioner contended that, according to the knowledge of his attorney, "no individual who has pled guilty to involvement in an illegal gambling business, cooperated, and received a Motion for Downward Departure has ever been sentenced to a term of incarceration in the Northern Division." Aff. of David M. Eldridge 2 (Attach. to Mot. for Reconsideration of Sent. Decision). Petitioner offered no information about the number of defendants in the sample known to his attorney or about the scope of their activities. The government responded that it was "aware of at least six cases in the Eastern District of Tennessee, from the Chattanooga area alone, in which a cooperating gambling defendant was sentenced to active prison time." Mot. to Strike Am. J. 2. The government listed each case, *id.* at 2-3, and "further note[d] that [petitioner's] gambling operation was far larger than that of any of these gambling defendants," *id.* at 3. It is far from clear, therefore, that petitioner can even establish that his offense involved "similar conduct" to those he seeks to use as comparators. And petitioner's claim of disparity also depends on artificially limiting the scope to defendants in the Northern Division. As the government demonstrated, petitioner's contention is refuted by including data from just one of the district's three other divisions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
LANNY A. BREUER
Assistant Attorney General
THOMAS E. BOOTH
Attorney

MAY 2009